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## MID-WINTER ISSUE



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1940-1941

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## PURPOSE

**The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.**

## President's Page

I AM writing this as the Mid-winter meeting of our Executive Committee draws to a close.

Aside from the satisfaction that comes from getting things done, the meeting has brought to me a very real feeling of enthusiasm for the future of our Association. Only two of the sixteen members of the Committee were absent—for reasons entirely out of their control. All present attended every session, and all had come at considerable sacrifice to their own endeavors. In fact, I was a bit chagrined to find that the meeting fitted into vacation plans of no one but Mrs. Brown and myself.

Such effort and the work accomplished can do nothing but give sure promise of lasting good to the Association.

The proposals made by Retiring President Hayes in his address at the September meeting were considered at some length, and a special committee, whose names appear elsewhere, was appointed to consider them and report on their feasibility and practicability. I know they desire and will welcome the suggestions and thoughts of everyone.

The real interest among the profession in the changes that are so rapidly taking place in procedure has led to the appointment of a standing committee on Practice and Procedure. They have a great field for work and their efforts will be awaited with interest.

Our Association has no great need for membership as such. However, in some states, and in some localities in all states, our representation among those qualified is not as we could desire it. If you are of those localities, or know qualified men in them, you can do a service by bringing to their attention the Association and its work.

OSCAR J. BROWN
*President*

**Insurance Counsel Journal**

PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
BIRMINGHAM, ALABAMA.

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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VOL. VIII JANUARY, 1941 NO. 1

## MID-WINTER MEETING OF EXECUTIVE COMMITTEE, JANUARY 27, 28 AND 29

*Report by the Editor*

THE mid-winter meeting of the Executive Committee was called to order by President Brown on Monday morning, January 27th. All members of the Executive Committee were present with the exception of two, who were unavoidably prevented from attending the meeting.

Prior to the meeting, the President prepared and furnished each member of the Executive Committee a program. This enabled the Committee to proceed according to schedule and to handle the business with dispatch.

After outlining the business on hand, President Brown called on Secretary Richard B. Montgomery, Jr., of New Orleans, who submitted a detailed report on the activities of his office since the last committee meeting, furnishing figures as to dues collected and describing the many and various duties performed by his office from day to day. Mr. Montgomery's report was read into the minutes of the meeting and ordered approved.

Our new Treasurer, Mr. Robert M. Noll of Marietta, Ohio, presented to the Committee a financial statement of the affairs of the Association which listed the expenses of the Journal, the Secretary's office, and the meeting at White Sulphur, and showed the sound financial condition of the Association as reflected by several bank deposits and an increase of the bank balance. The report of the Treasurer, after being audited, was approved and ordered filed. (Bob is not only a good golfer and pipe smoker, but is a good Treasurer).

The Committee considered and acted on a large number of applications for membership, and the Secretary was requested to notify all applicants of the Committee's action.

* * *

## RECOMMENDATIONS OF PAST PRESIDENT GERALD P. HAYES

Those who attended our last general meeting at White Sulphur will recall that our then President, Gerald P. Hayes, recommended to the Association that a central office be established, and that an executive secretary be designated, who should perform the detailed duties that are now performed by the Secretary, the Treasurer, and the Editor. President Hayes' address will be found on pages 34-36 of the October 1940 issue of Insurance Counsel Journal.

Mr. Hayes re-stated his views and recommendations at President Brown's request. The members of the committee discussed the problems presented and expressed views as to the advisability and feasibility of such a change. As a result of this discussion the Executive Committee passed a resolution authorizing the President to appoint a committee to study the question and to present at the Executive Committee meeting immediately preceding the Annual Meeting their findings of fact and recommendations. President Brown appointed Mr. William O. Reeder, of St. Louis, Missouri, as Chairman, and Mr. Pat H. Eager, Jr., of Jackson, Mississippi, and Mr. Royce G. Rowe, of Chicago, Illinois, as members of this committee.

This newly appointed committee has requested the Journal to solicit the views and

suggestions of all members of the Association on this subject. Please address your communications to Mr. William O. Reeder, Ambassador Building, St. Louis, Missouri.

Although most of you no doubt know something of the inner workings of the Association during the past few years, it may not be out of place at this time to briefly describe the system in effect. For a number of years no officer of the Association or member of the Executive Committee has received any compensation from the Association for the work done by him from year to year. The Secretary receives no salary or compensation whatsoever. He is furnished an assistant, however, who handles the details of the office of the Secretary, and, so far as possible, relieves the Secretary. The Treasurer is not furnished any assistant, but the Association pays for an audit of his accounts once a year. The Association pays for the actual cost of the publication of the Journal, which is the amount paid to the printer and the expense of mailing, and the Editor is furnished with a partime Secretary. From time to time the Executive Committee has authorized certain expenditures of officers for attending meetings and conferences in and about the business of the Association. These expenditures, however, have been limited to actual expenses.

* * *

## REPORT TO THE MEETING BY THE EDITOR

President Brown called on the Editor of the Journal for his report and also his recommendations in regard to the establishing of a central office as suggested by former President Hayes.

Your Editor reported in substance that the cost of the Journal is approximately $3,000 a year, that the office of the Journal has no bank account and does not handle any funds of the Association, that each issue of the Journal consists of between 1600 and 1800 copies, and that an effort has been made for some time to keep on hand at least 100 copies of each issue of the Journal to be mailed from time to time to members requesting special back issues. He expressed the view that the growth, the activities, and the position of the Association warrant serious consideration by the Executive Committee and the membership of the recommendations of past President Hayes, namely, that the Association establish a central headquarters and office of a permanent nature, and that an executive secretary of the Association be designated to take over the detailed duties of the Secretary, Treasurer, and Editor and to a large extent perform all of the duties now and heretofore performed by each of the three officers.

Your Editor suggested to the Executive Committee that, if such an office be established and an executive secretary be designated, the executive secretary should not be a member of the Association, should have no part in the deliberations of the Association, and should be subject at all times to the direction and control of the President and the Executive Committee. He also suggested that consideration be given to improvement of the Journal, and to the advisability and feasibility of increasing the number of issues each year, of devoting space in each issue for digests of the more important current insurance decisions, of designating a committee of three members of the Executive Committee to have immediate control over the publication and policy of the Journal, or of designating an editor-in-chief whose duty it would be to supervise the publication with the assistance of associate editors from each Circuit Court of Appeals section of the country.

We are rather proud of the fact that the Journal has never carried any kind of advertisement. It is certainly unique in that respect, for few publications are free of advertising matter. From time to time since the inception of the Journal, applications for advertising matter have been received, but the Committee has on all occasions instructed the Editor to decline the advertisements. As a very substantial portion of the cost of publishing the Journal could be obtained by ac-

cepting advertising matter, we suggest that all members give Mr. William O. Reader your views on this subject when you write to him in regard to the more important subject referred to above.

* * *

## ROSTER OF MEMBERS

The roster of membership of the Association will be published in the April issue of the Journal. Please write to the Secretary or the office of the Editor and advise of any change in your office address or firm name. By so doing, you will greatly assist your Secretary and Editor in publishing for your convenience a correct and complete roster of the membership of your Association.

* * *

## 1941 ANNUAL CONVENTION

The Committee, after giving due and careful consideration to the date and place of the 1941 Annual Convention, has chosen as the date September 3, 4 and 5, and has selected as the meeting place THE GREENBRIER at White Sulphur Springs, West Virginia. We hope that you will make a note of these dates and arrange your vacation and business so that you will be able to attend.

The President is now and has been for some weeks planning the program for your 1941 meeting. He has already arranged to have as speaker for this meeting one of the outstanding business and insurance executives of our nation, Mr. James S. Kemper, President of the United States Chamber of Commerce.

* * *

## COMMITTEE APPOINTMENTS FOR 1940-41

You will find in this issue of the Journal a complete roster of the membership committees and legislative committees for the several States. The Executive Committee and President solicit your cooperation with these committees.

Mr. F. B. Baylor, Sharp Building, Lincoln, Nebraska, is now our General Chairman of the Legislative Committees. Please address to Mr. Baylor all communications with reference to legislative matters. It is not the policy of the Association to initiate legislation but merely to cooperate with other organizations in reference thereto.

A number of other matters were presented to the meeting and discussed by the members of the Executive Committee which may be presented to the members for consideration at a later date.

* * *

## LIMITATION OF MEMBERSHIP

It has been suggested to the Executive Committee on a number of occasions by members of the Association that no additional members be taken into the Association, or that the maximum number of members be fixed. The Executive Committee at their last meeting gave consideration to these suggestions. It was the sense of the Committee, however, that for the present no limitation on the number of members be arbitrarily fixed.

It is the personal opinion of your Editor that there are many outstanding trial insurance lawyers and Home Office counsel not members of the Association who are in every respect eligible. Your Editor suggests that the several Membership Committees give consideration to the immediate survey of eligible Home Office counsel and trial insurance lawyers in their respective States, and after a careful check of qualifications extend an invitation to such attorneys that the several Committees find desirable and eligible.

Your Editor feels confident that there are many Home Office counsel and many trial insurance lawyers who would be glad to join our Association and who would become valuable and enthusiastic members if they were apprised of the object and purposes of the Association and extended an invitation to join. The reason for the appointment from year to year of Membership Committees is not only to pass on qualifications of applicants for membership, but to extend invitations to those lawyers who are qualified for membership and who should be members of the Association.

# Standing Committees of the Association

## CASUALTY INSURANCE

*Chairman:* Melvin M. Roberts, Guardian Building, Cleveland, Ohio.

Fred S. Ball, Jr., First National Bank Building, Montgomery, Alabama.

Fletcher B. Coleman, State Farm Mutual Building, Bloomington, Illinois.

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Forrest A. Betts, Title Insurance Building, Los Angeles, California.

St. Clair Adams, Jr., American Bank Building, New Orleans, Louisiana.

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Howard D. Brown, United Artists Building, Detroit, Michigan.

Herbert W. J. Hargrave, 68 William Street, New York City.

Allan E. Brosmith, Travelers Insurance Company, 700 Main Street, Hartford, Connecticut.

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Rupert G. Morse, Insurance Exchange Building, Kansas City, Missouri.

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Burrell Wright, Merchants Bank Building, Indianapolis, Indiana.

Miller Manier, Baxter Building, Nashville, Tennessee.

James E. Nugent, Bryant Building, Kansas City, Missouri.

*Ex-officio:* Wilson C. Jainsen, Hartford Acc. & Ind. Co., 690 Asylum Avenue, Hartford, Conn.

## HOME OFFICE COUNSEL

*Chairman:* Hugh D. Combs, United States Fidelity & Guaranty Co., Baltimore, Maryland.

John A. Luhn, Fidelity & Deposit Co., of Maryland, Baltimore, Maryland.

Victor C. Gorton, Allstate Insurance Company, 20 North Wacker Drive, Chicago, Illinois.

George L. Naught, American Surety Company, 100 Broadway, New York City.

Patrick F. Burke, Indemnity Insurance Company of N. A., 1600 Arch Street, Philadelphia, Penn.

Berkeley Cox, Aetna Life Insurance Company, Hartford, Connecticut.

Price H. Topping, Guardian Life Ins. Co., of America, 50 Union Square, New York City.

Raymond N. Caverly, Fidelity & Casualty Co. of N. Y., 80 Maiden Lane, New York City.

Franklin J. Marryott, Liberty Mutual Insurance Company, 175 Berkeley Street, Boston, Mass.

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W. Calvin Wells III, Lamar Life Building, Jackson, Mississippi.

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*Ex-officio:* Oliver R. Beckwith, The Aetna Casualty & Surety Co., 151 Farmington Avenue, Hartford, Connecticut.

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Wayne Ely, Bank of Commerce Building, St. Louis, Missouri.

Ralph R. Hawxhurst, 1 North LaSalle Street, Chicago, Illinois.

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John A. Kluwin, 735 N. Water Street, Milwaukee, Wisconsin.

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Leo B. Parker, 900 Waltower Building, Kansas City, Missouri.

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Mrs. Robert W. Shackleford, Tampa, Florida.

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Mrs. Walter Mayne, St. Louis, Missouri.

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Ivan Robinette, Professional Building, Phoenix.

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A. L. Barber, Donaghey Building, Little Rock.

Harvey T. Harrison, Southern Building, Little Rock.

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Joe Crider, Jr., 650 S. Spring Street, Los Angeles.

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Abel Klaw, DuPont Building, Wilmington.

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Barry Wright, Rome.

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John E. Tarrant, Kentucky Home Life Building, Louisville.

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Wilber M. Brucker, Penobscot Building, Detroit.

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William Thompson, Republic Bank Building, Dallas.

Bert King, City National Bank Building, Wichita Falls.

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# Suggestions for Handling Forgery Losses With a View to Preserving Salvage Rights

By Stevens T. Mason
*Detroit, Michigan*

IN this discussion it will be assumed that the surety will always take an assignment when paying a loss due to check forgery rather than depend on subrogation rights which are often somewhat elusive. An assignment being a mere transfer of a chose in action will often avoid the strict rules of subrogation. But it must always be remembered that a surety suing on an assignment has no greater rights than the assignor.

Before paying a loss the surety should definitely determine whether the obligee has anything to assign.

1. Has the obligee really suffered a loss?
2. When the obligee collects from the surety is there danger of an election of remedies?
3. Is the surety running into a right of subrogation against itself?

These three questions are fraught with many pitfalls for the unwary, and should be carefully studied before paying a loss. Furthermore they are questions which we must consider with an open mind because in some cases we may represent the surety paying the loss, and in others we may represent the blanket bond of the salvagee.

*Is There a Loss?*

Ever since the case of *Price v. Neal*, 3 Burr. 1354, (decided in 1762), a bank has been charged with knowledge of its depositor's signature. Therefore, if a bank pays a check upon which the depositor's signature has been forged the payment will be considered to have been made out of the funds of the bank, and not out of the depositor's account.

Likewise, if a bank pays a check upon which the endorsement has been forged the payment will also be considered to have been made out of the funds of the bank, and not out of the depositor's account, because the bank is under contract to pay checks only to persons designated by the depositor.

In neither case is the bank permitted to charge the depositor's account with the amount of the check. Therefore, the depositor has suffered no loss.

If the surety now pays the depositor both the depositor and the surety admit a loss by admitting that it was the depositor's money that the bank paid out, thereby possibly ratifying the bank's action in paying the check.

The only right the depositor has to assign to the surety is based on the theory that the bank has still got the depositor's money; but by collecting from the surety the depositor admits a loss, thereby admitting that the bank has not got the depositor's money.

The above propositions are not stated as definite rules of law because they have given rise to many conflicting and confusing authorities in various jurisdictions. It is not the purpose of this article to discuss them. The propositions are set out as dangers to be avoided. The authorities may be conflicting but the danger is obvious. The purpose of this article is merely to point out how these dangers may be avoided before making payment to the obligee.

*Election of Remedies*

The question of election of remedies is so closely associated with the question just discussed that they might almost be considered together.

The obligee, whether it be a depositor, a beneficiary of an estate, or a public body, has two separate remedies—(1) To deny the bank's right to charge the forged checks to the account, thereby claiming that the checks were paid with the bank's own money and not out of the account. (2) To make claim against the surety, thereby admitting a loss from the account, and thereby admitting that the checks were paid with the obligee's money.

Are these two positions inconsistent and antagonistic?

In the first remedy the bank suffers the loss and takes an assignment against the surety. The surety must defend a suit by the bank.

In the second remedy the surety suffers the loss and takes an assignment against the bank. The bank must defend a suit by the surety.

In 9 C. J. S. Page 752 is the following:

"A plaintiff who sues a drawee bank on a check paid by it on a forged indorsement takes the position that the bank still has his money, that the money paid out by the bank was the bank's money, and that such payment was not binding on plaintiff; and, where he sues another who has indorsed such check over to the drawee bank, he necessarily takes the position that the money paid by the drawee bank was wrongfully paid and, therefore, wrongfully detained. Such positions are mutually contradictory, and in choosing his remedies plaintiff cannot adopt both positions. In this regard, each check is considered as an entirety which cannot be either rightfully or wrongfully split."

The case of *National Surety Co. v. Perth Amboy Trust Co.*, 76 Fed. 2d 87, expresses the same thought in different language. In that case the court said that the beneficiaries "had recovered from the surety on the theory that the money obtained by means of the forgery was the money that belonged to the beneficiaries. For otherwise recovery from the surety would not have been possible. The money stolen by the defaulter could not belong to the beneficiaries unless the checks had been properly paid by the bank." Therefore, the court said that if the checks were properly paid by the bank the recovery from the surety has been a complete remedy, and there has been such an election as discharges the bank.

In the case of *Trust Co. v. First National Bank*, 271 Mich. 323, a decree was obtained by an administrator against the daughter of the intestate who had forged a withdrawal slip. The forger was uncollectible so another suit was started against the bank. The court said that there could be no recovery in the former case except on the theory that the forger had possessed herself of money belonging to the estate rather than of money belonging to the bank. Otherwise the estate could not have been defrauded.

"If she had it of course the bank did not have it. Therein lies the inconsistency between the former case and the present suit."

In *U. S. F. & G. v. Fidelity National Bank*, 109 S. W. 2d. 47 (Missouri) the *U. S. F. & G.* paid a check forgery loss of the Continental Construction Co. and took an assignment and sued the bank. The court used the same reasoning, i.e., that either the bank had the Continental's money or the forger had.

"Obviously both could not have the same money at the same time. Continental could have proceeded against either, but could not go two ways at the same time. As the Scottish law is said to have it, one cannot both approbate and reprobate at one and the same time. * * * * When the plaintiff (surety) paid the loss it had contracted to pay the election of the Continental was completed, * * * * and estops the plaintiff from further asserting the claim."

This question of election of remedies is one upon which there is much conflict of authority. As stated above the purpose of this article is not to discuss the merits of these authorities, but to point out from the cases cited that there is a danger, which may and should be avoided before payment is made.

*Conflicting Subrogations*

A surety paying a creditor, cannot acquire the creditor's claim against a third party who, had he paid the creditor, would have been entitled to subrogation against the surety.

For example—A public officer or a fiduciary gives a bond that he will faithfully perform the duties entrusted to him. By forgery or otherwise he gets the money entrusted to him out of the bank and spends it. The surety on the bond pays the loss to the obligee and takes an assignment against the bank and brings suit.

The first question which presents itself is this: Is the bank within the protection of the surety bond? That is, if the bank had paid the loss could the bank have recovered from the surety? If it could the surety is running directly into a right of subrogation against itself.

This question could seldom arise on a private bond, which is merely a private contract to take the loss, or the burden of liti-

gation, off the shoulders of the assured, but in connection with payments upon probate and public official bonds, which are often broad enough to permit recovery by any person suffering loss because of the acts of the principal, the problem always arises.

In *American Surety Co. v. Robinson,* 53 Fed. 2d 22 the court said:

> "By analogy to the principle of insurance law where an insurer paying a loss may go against even a tort feasor who caused it, the surety may often be subrogated to the independent rights of action of the creditor against third parties. *But this can never happen when such third party, if held liable in the first instance, would have had recourse on the principal and his surety."*

This case was very fully discussed in an annotation in 95 A.L.R. at Page 272.

In the case of *American Surety Co. v. Lewis State Bank,* 58 Fed. 2d 559 (5th C. C. A.) a game warden fraudulently caused to be issued a number of warrants to fictitious payees which he forged and collected the money at the defendant bank.

The state collected on his statutory bond, and the surety took an assignment from the state and sued the bank. But the court in holding that the surety was running into a right of subrogation against itself said:

> "Where, as here, a bank of public deposit has without complicity in, or knowledge of, the fraud been innocently misled by principal into paying out public moneys which under its contract it agreed to pay only to those lawfully entitled to it, as between the state and the principal and surety on the bond, it is the real surety, entitled to exoneration to the extent of the bond before it pays, and to subrogation to it after it pays." See also *American Bonding Co. v. State Savings Bank,* 133 Pac. 367 (Mont.)

In the case of *Southern Surety Co. v. Tessum,* 228 N. E. 326 (Minnesota); 66 A. L. R. 1136, a surety who had made good the default of one of two trustees, sought to recover from the co-trustee, and his surety. The court said:

> "We have found no case where it (the right to bring the action) has been applied in favor of the surety of a trustee against a co-trustee or the bondsmen of the latter, where the co-trustee would have been entitled to indemnity from the principal of the very surety who claims the right to subrogation."

In *National Surety v. Arosin,* 198 Fed. 605; 117 C. C. A. 313, a Deputy County Auditor, for whose acts the surety bond was responsible to any person injured by his misconduct in office, forged certain orders and sold them to a bank. The county collected the loss from the surety and the surety sued the bank. The court held that the loss was one caused by the Deputy, for which the surety was liable, and that it could not recover from the bank because if the bank had been compelled to pay a loss it could have recovered from the surety.

*Negligence of the Bank*

If the bank is negligent a different question is presented. The surety's action would not be on the contract, but would be ex delicto. But in order to hold the bank liable in such an action it is necessary to prove that the bank is a joint tort feasor. That is, that the bank had knowledge of the fraud or profited by it.

The question is not pertinent to this article, but it is fully discussed in the following authorities:

26 R. C. L. 1315; 9 C. J. S. 610;

*Commercial Savings Bank & Trust Co., v. National Surety Co.,* 294 Fed. 261;

*Maryland Casualty Co. v. City National Bank,* 29 Fed. 2d 662;

*Vass v. Arkenbaugh,* 55 Fed. 2d 130;

*Quanah v. Wichita Bank,* (Tex. Sup. Ct.) 83 S. W. 2d 701;

*Trust Co. v. First National Bank,* 271 Mich. 323; 57 A. L. R. 925;

64 A. L. R. 1404; 106 A. L. R. 836; 115 A. L. R. 648.

*Proximate Cause*

In all cases where subrogation occurs, whether it be by assignment or not, the principle of equity and good conscience is the deciding factor. The loss must always fall where the proximate cause rests. In the case of *United States Fid. & Guaranty Co. v. Title Guaranty & Trust Co.,* 200 Fed. 443, the court said:

"Where two sureties are innocent, the loss must fall on the one whose principal's default was the proximate cause of such loss."

In the case of *American Bonding Co. v. Waltz,* 193 Fed. 978; 113 C. C. A. 598, the court said that the surety on the auditor's bond could not recoup its loss from the county treasurer on the theory that his negligence permitted the defalcation. That it was clear that the proximate cause of the loss was the malfeasance of the auditor for whose honesty and faithfulness the surety had bound itself.

In the very recent case of *United States Guaranty Co. v. Elkins Morris & Co.,* 106 Fed. 2d 136, the plaintiff surety issued an indemnity bond against forgeries. A stock certificate was forged. The defendant brokers guaranteed the signature and issued a check for the purchase of the stock. The endorsement of the check was also forged. The plaintiff sued the defendant brokers on the guaranty. The court said:

"The immediate and proximate cause of the loss was the forged endorsement of the check, specifically covered by the forgery bond."

Therefore, the plaintiff could not recover.

See also *Meyers v. Bank,* (Cal.) 77 Pac. 2d 1081.

In *Northern Trust Co. v. Consolidated Elevator Co.,* 142 Minn. 132; 171 N. W. 265, the court said:

"The right to recover from a third person does not stand on the same footing as the right to recover from the principal, as to the latter, the right is absolute; as to the former, it is conditional. * * * When it is sought to enforce the right, something more must be shown than that defendant could have been compelled by the original creditor to pay the debt. The object of subrogation is to place the charge where it ought to rest by compelling the payment of the debt by him who ought in equity to pay it."

Cases that deal with the balancing of equities are collected in the following notes:

"Right of third person to be subrogated to depositor's claim against bank on account of the latter's payment of forged or raised checks." 77 A. L. R. 1057.

"Right of surety on fidelity bond to be subrogated to obligee's right as against third person who caused or contributed to the loss or failed in his duty to discover it." 95 A. L. R. 269.

*Conclusion*

All of the questions here discussed can be greatly clarified by holding always in mind the statement in 4 Williston on Contracts (Rev. Ed.) by Williston & Thompson, Pages 3618 and 3620.

"Though a creditor is generally entitled to collect his claim from any securities or obligations which he holds in the manner which may seem most to his advantage, it is the duty of the court, especially a court of equity to adjust the rights of the parties so far as possible, so that the ultimate loss shall accord with the equitable position of the parties.

A surety who has paid the debt is entitled to the right for the purpose of charging property or persons equitably bound to pay the debt before himself. The justice of the principle will be apparent if it is observed that in this way *the creditor is denied the power of throwing the ultimate payment of the debt in one way or the other as suits his caprice."*

In other words, this seems to be the proper analysis of the problem: We must start out with the premise upon which the whole law of subrogation and contribution is based, that is, as stated by Williston, that the creditor shall not be allowed to throw the liability on one person or another, as suits his caprice. Therefore, in a situation where a surety and a third person are both bound to the creditor for the amount of the principal's default, we have to determine these questions: First, will the creditor elect its remedy in collecting from the surety; Second, is the third person himself within the protection of the surety bond? If he is, it necessarily follows that the surety is the one upon whom the loss should fall, as between him and the third person. If the third person pays the creditor, he has a right of indemnity or subrogation as against the surety, where-

as, if the surety pays the creditor, he has no right of indemnity or subrogation, and cannot acquire one by way of assignment, against the third person. Third, even if the defendant third person is not within the protection of the surety bond, under the technique adopted by the Restatement of Restitution, (Section 162, Comment h) we have to ask the question: As between the surety and the third person which one, in equity and good conscience, ought to bear the loss?

If it is determined that the surety is the one who in equity and good conscience should bear the loss, it follows that the surety can acquire no right against the third person.

*Suggestions*

All of these dangers may be avoided by following the simple rules here submitted:

*Suggestion No. 1*

If the loss arises from a forged endorsement and the depositor's bond also extends coverage to the depository bank, the surety, in order to preserve rights against the cashing bank, should make payment to the depository bank. Never to the depositor. The depository bank should be asked to make proof of loss, and should execute a proper assignment of its rights against the cashing bank. This was successfully done in *Metropolitan Casualty Co. v. First National Bank*, 261 Mich. 450.

*Suggestion No. 2*

If the loss arises from a forged endorsement and the bond does not extend coverage to the depository bank payment may still be made to the depository bank with its consent. For though the bank is not covered by the bond it must necessarily agree to this simple solution, because in the last analysis it cannot deny its legal liability. It should not object to selling its claim against the cashing bank to the surety.

*Suggestion No. 3*

If the loss arises from a forged signature of the maker and the surety wishes to preserve rights against the depository bank (provided, of course, the bond does not extend coverage to the depository bank) payment may be made by means of a loan receipt and suit brought in the name of the depositor. This method was approved in the case of a casualty payment in *Luckenbach v. McCann Sugar Refining Co.*, 248 U. S. 139; 1 A. L. R. 1522. The form there construed can easily be adapted to a forgery payment.

*Suggestion No. 4*

The best way out of any of these situations is a bill in equity asking for a decree requiring the bank to pay the loss and exonerating the surety, or an action for declaratory judgment. But a surety company is seldom in a position to make quite such a strong move.

These suggestions apply to all forms of bonds or policies requiring payment of losses due to forgery. As cases arise methods may suggest themselves which are better than those mentioned above. Moreover there are many excellent authorities which might help us out of such situations as are here discussed. But the purpose of this article is to emphasize the vital importance of formulating a plan to preserve the surety's right to salvage before the loss is paid. Otherwise it may be too late.

# Report of the Committee on Casualty Insurance to 1940 Annual Meeting of Insurance Counsel

TO the International Association of Insurance Counsel at its annual meeting held September 4, 1940:

The committee on casualty insurance, after giving consideration to several fields of endeavor, finally decided that its efforts might be most beneficially directed toward the investigation of some phase of the law which casualty insurance has developed. We found that apparently some work might profitably be done in relation to the liability of an insurer beyond the monetary limits of its policy, especially if the study were made to apply to the entire, and not to some limited, field of casualty insurance. Accordingly, the committee has prepared a list of what it believes are substantially all the cases dealing specifically with said liability of an insurer arising from a failure to settle and a failure to defend, or to defend properly the original action against the insured. The report includes a classification of the cases by states, under the sub-headings of bad faith and negligence, an abstract of the decisions and an outline suggesting the steps which an insurer should take in protecting itself against

the possibility of an enforceable claim in excess of the policy limit.

We hope that our work will appear to be of sufficient importance that the report will be annually brought down to date, by adding thereto other cases as they are decided.

The committee recommends that a future committee develop the law incident to the court procedure which an insurer may follow when the judgment exceeds the limit of the policy, a subject which is not covered by this report.

Respectfully submitted,

F. B. BAYLOR, *Chairman*
FRED S. BALL, JR.
MELVIN M. ROBERTS
THEODORE W. BETHEA
PAYNE KARR
FLETCHER B. COLEMAN
IRVIN E. KERR
L. J. CAREY, *ex officio*

### *Liability of a Casualty Insurer Beyond the Monetary Limits of its Policy*

It is generally held that a casualty insurer has, under the policies now commonly used, the option to settle or defend the action brought against the insured. Accordingly, it has been held that a charge of a failure to settle a claim made against the insured is not a valid basis for a recovery against an insurer of an amount in excess of the limit fixed by the policy, in the absence of bad faith or negligence. Wynnewood Lumber Co. v. Travelers' Insurance Co. (1917) 173 N. C. 269, 91 S. E. 946; Kingan & Co. v. Maryland Casualty Co. (1917) 65 Ind. App. 301, 115 N. E. 348; Georgia Casualty Co. v. Mann (1932) 242 Ky. 447, 46 S. W. (2d) 277; Brunswick Realty Co. v. Frankfort Ins. Co. (1917) 99 Misc. 639, 166 N. Y. S. 36; Schmidt & Sons v. Travelers' Insurance Co. (1914) 244 Pa. 286, 90 Atl. 653. It also has been held that if the insurer fails to defend the action brought against the insured, the failure will constitute a waiver of the policy provision denying the right of settlement to the insured. Consequently, as a result of such failure, the insured may have the right to settle for a reasonable amount within the limit of the policy. St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co. (1906) 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712; Butler Bros. v. American Fidelity Co. (1913) 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (NS) 609; Interstate Casualty Co. v. Wallins Creek Coal Co. (1915) 164 Ky. 778, 176 S. W. 217, L. R. A. 1915F, 958.

### *I. Failure to Settle*

However, the decisions of many of the courts announce the rule that recovery of an amount in excess of the limit of the policy may be had against a casualty insurer, if the insurer has failed to enter into or consummate a possible settlement, provided:

(a) The insurer was guilty of bad faith, or
(b) The insurer was guilty of negligence.

### *A. Bad Faith, a Basis of Liability for Failure to Settle*

The courts, in the following cases, have discussed an insurer's bad faith in failing to settle, although in the cases indicated by an an asterisk, bad faith apparently was not an issue. In other cases, not bearing an asterisk and set out in the immediately following list, the courts have asserted either by the judgment rendered, or the language employed, or by both, the existence of liability when bad faith was present.

### *List of Cases on Bad Faith in Failing to Settle*

Note: *Bad Faith not an issue.

*Alabama*

Neuberger v. Preferred Accident Ins. Co. (1921) 18 Ala. App. 72, 89 So. 90.

American Mutual Liability Ins. Co. v. Cooper (1932) 1 Fed. (2nd) 446.

*Arizona*

No cases.

*Arkansas*

No cases.

*California*

No cases.

*Colorado*

No cases.

*Connecticut*

Bartlett v. Travelers' Lns. Co. (1933) 117 Conn. 147, 167 Atl. 180.

Hoyt v. Factory Mut. Liability Ins. Co. of America (1935) 120 Conn. 156, 179 Atl. 842.

*Delaware*

No cases.

*District of Columbia*

No cases.

*Florida*

Automobile Mut. Indemnity Co. v. Shaw (1938) 134 Fla. 851, 184 So. 852.

*Georgia*

No cases.

*Idaho*

No cases.

*Illinois*

No cases.

*Indiana*

*Kingan & Co. v. Maryland Casualty Co. (1917) 65 Ind. App. 301, 115 N. E. 348.

*Iowa*

No cases.

*Kansas*

No cases.

*Kentucky*

Fidelity & Casualty Co. v. Stewart Dry Goods Co. (1925) 208 Ky. 429, 271 S. W. 444.

*Georgia Casualty Co. v. Mann (1932) 242 Ky. 147, 46 S. W. (2nd) 777.

*Louisiana*

*New Orleans & C. R. Co. v. Maryland Casualty Co. (1905) 114 La. 153, 38 So. 89, 6 L. R. A. (NS) 562.

Davis v. Maryland Casualty Co. (1931) 16 La. App. 253, 133 So. 769.

*Maine*

*Rumford Falls Paper Co. v. Fidelity & Casualty Co. (1899) 92 Me. 574, 43 Atl. 503.

*Maryland*

No cases.

*Massachusetts*

No cases.

*Michigan*

City of Wakefield v. Globe Indemnity Co. (1929) 246 Mich. 645, 227 N. W. 643.

*Minnesota*

Mendota Electric Co. v. New York Indemnity Co. (1926) 169 Minn. 377, 211 N. W. 317.

Mendota Electric Co. v. New York Indemnity Co. (1928) 175 Minn. 181, 221 N. W. 61.

Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp. (1938) 204 Minn. 50, 282 N. W. 481.

Norwood v. Travelers' Ins. Co. (1939) 204 Minn. 595, 284 N. W. 785.

*Mississippi*

*Georgia Casualty Co. v. Cotton Mills Products Co. (1931) 159 Miss. 396, 132 So. 73.

Farmers Gin Co. v. St. Paul Mercury Indemnity Co. (1939) 187 Miss. 747, 191 So. 415.

*Missouri*

*Mears Mining Co. v. Maryland Casualty Co. (1912) 162 Mo. App. 178, 144 S. W. 883.

St. Joseph Transfer & Storage Co. v. Employers Indemnity Co. (1930) 224 Mo. App. 221, 23 S. W. (2nd) 215.

Maryland Casualty Co. v. Cook-O'Brien Const. Co. (1934) 69 Fed. (2nd) 462.

Maryland Casualty Co. v. Elmira Coal Co. (1934) 69 Fed. (2nd) 616.

McCombs v. Fidelity & Casualty Co. of New York (1936) 231 Mo. App. 1206, 89 S. W. (2nd) 114.

*Montana*

No cases.

*Nebraska*

Kleinschmit v. Farmers Mut. Hail Ins. Co. (1939) 101 Fed. (2nd) 987.

*Nevada*

No cases.

*New Hampshire*

No cases.

*New Jersey*

No cases.

*New Mexico*

No cases.

*New York*

*Schencke Piano Co. v. Philadelphia Casualty Co. (1915) 216 N. Y. 662, 110 N. E. 1049.

Brunswick Realty Co. v. Frankfort Ins. Co. (1917) 99 Misc. 639, 166 N. Y. S. 36.

*Auerbach v. Maryland Casualty Co. (1923) 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.

*Streat Coal Co. v. Frankfort General Ins. Co. (1923) 237 N. Y. 60, 142 N. E. 352.

*Best Building Co. v. Employers Liability Assur. Corp. (1928) 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464.

*North Carolina*

*Wynnewood Lumber Co. v. Travelers' Ins. Co. (1917) 173 N. C. 269, 91 S. E. 946.

State Automobile Ins. Co. v. York (1939) 104 Fed. (2nd) 730.

*North Dakota*

No cases.

*Ohio*

Cleveland Wire Spring Co. v. General Accident, Fire & Life Assur. Corp. (1917) 6 Oh. App. 344, 27 O. C. A. 536.

*Oklahoma*

Boling v. New Amsterdam Casualty Co. (1935) 173 Okla. 160, 46 Pac. (2nd) 916.

*Oregon*

Brown & McCabe, Stevedores v. London Guarantee & Accident Co. (1915) 232 Fed. 298.

*Pennsylvania*

*Schmidt Brewing Co. v. Travelers' Ins. Co. (1914) 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (NS) 126.

*Rhode Island*

No cases.

*South Carolina*

Tiger River Pine Co. v. Maryland Casualty Co. (1931) 163 S. C. 229, 161 S. E. 491.

Tyger River Pine Co. v. Maryland Casualty Co. (1933) 170 S. C. 286, 170 S. E. 346.

Blue Bird Taxi Corp. v. American Fid. & Cas. Co. (1939) 26 Fed. Supp. 808.

*South Dakota*

No cases.

*Tennessee*

Aycock Hosiery Mills v. Maryland Casualty Co. (1928) 157 Tenn. 559, 11 S. W. (2nd) 889.

Noshey v. American Automobile Ins. Co. (1934) 68 Fed. (2nd) 808.

*Texas*

No cases.

*Utah*

No cases.

*Vermont*

*Johnson v. Hardware Mut. Casualty Co. (1938) 108 Vt. 269, 187 Atl. 788.

Johnson v. Hardware Mut. Casualty Co. (1939) 109 Vt. 481, 1 Atl. (2nd) 817.

*Virginia*

No cases.

*Washington*

No cases.

*West Virginia*

No cases.

*Wisconsin*

Wisconsin Zinc Co. v. Fidelity & Deposit Co. (1916) 162 Wis. 39, 155 N. W. 1081, Ann. Cas. 1918C 399.

Hilker v. Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413.

*Ballard v. Ocean Accident & Guarantee Co. (1936) 86 Fed. (2nd) 449.

Lanferman v. Maryland Casualty Co. (1936) 222 Wis. 406, 267 N. W. 300.

*Wyoming*

No cases.

### *B. Negligence, a Basis of Liability for Failure to Settle*

In many of the cases in which the courts have considered the question of an insurer's liability for failing to settle, both bad faith and negligence in connection therewith are discussed, it appearing that some of the courts are inclined to hold that the facts which support the charge of the one will support the charge of the other. For that reason, many of the cases hereafter listed under the heading, "Negligence, a Basis of Liability for Failure to Settle," are the same as those listed under the heading, "Bad Faith, a Basis of Liability for Failure to Settle." In all the cases set out in the immediately following list, negligence is discussed. In a number of such cases, indicated by an asterisk, negligence was not an issue. The courts, in some of the cases in such list, indicated by a double asterisk, have held that negligence alone is a valid basis of liability, while in others, not marked, it is held that negligence, in the absence of bad faith, will not sustain a recovery.

### *List of Cases on Negligence in Failing to Settle*

Note: *Negligence not an issue.
**Insurer held liable for negligence.

*Alabama*

No cases.

*Arizona*

No cases.

*Arkansas*

No cases.

*California*

No cases.

*Colorado*

No cases.

*Connecticut*

Bartlett v. Travelers' Ins. Co. (1933) 117 Conn. 147, 167 Atl. 180.

Hoyt v. Factory Mut. Liability Ins. Co. of America (1935) 120 Conn. 156, 179 Atl. 842.

*Delaware*

No cases.

*District of Columbia*

No cases.

*Florida*

*Auto Mut. Indemnity Co. v. Shaw (1938) 134 Fla. 815, 184 So. 852.

*Georgia*

No cases.

*Idaho*

No cases.

*Illinois*

No cases.

*Indiana*

No cases.

*Iowa*

No cases.

*Kansas*

Anderson v. Southern Surety Co. (1920) 107 Kan. 375, 191 Pac. 583.

*Kentucky*

Georgia Casualty Co. v. Mann (1932) 242 Ky. 447, 46 S. W. (2nd) 777.

*Louisiana*

*New Orleans & C. R. Co. v. Maryland Casualty Co. (1905) 114 La. 153, 38 So. 89, 6 L. R. A. (NS) 562.

*Maine*

*Rumford Falls Paper Co. v. Fidelity & Casualty Co. (1899) 92 Me. 574, 43 Atl. 503.

*Maryland*

No cases.

*Massachusetts*

**Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co. (1917) 240 Fed. 573.

**Abrams v. Factory Mut. Liability Ins. Co. (1937) — Mass. —, 10 N. E. (2nd) 82.

*Michigan*

City of Wakefield v. Globe Indemnity Co. (1929) 246 Mich. 645, 225 N. W. 643.

*Minnesota*

Norwood v. Travelers Ins. Co. (1939) 204 Minn. 595, 284 N. W. 785.

*Mississippi*

Georgia Casualty Co. v. Cotton Mills Products Co. (1931) 159 Miss. 396, 132 So. 73.

Farmers Gin Co. v. St. Paul Mercury Indemnity Co. (1939) 187 Miss. 747, 191 So. 415.

*Missouri*

*St. Joseph Transfer & Storage Co. v. Employers Indemnity Co. (1930) 224 Mo. App. 221, 23 S. W. (2nd) 215.

*Maryland Casualty Co. v. Elmira Coal Co. (1934) 69 Fed. (2nd) 616.

McCombs v. Fidelity & Casualty Co. of New York (1936) 231 Mo. App. 1206, 89 S. W. (2d) 114.

*Montana*

No cases.

*Nebraska*

Kleinschmit v. Farmers Mut. Hail Ins. Co. (1939) 101 Fed. (2nd) 987.

*Nevada*

No cases.

*New Hampshire*

**Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corp. (1919) 79 N. H. 186, 106 Atl. 604.

**Douglas v. United States Fidelity & Guaranty Co. (1924) 81 N. H. 371, 127 Atl. 708, 37 A. L. R. 1477.

**Maryland Casualty Co. v. Wyoming Valley Paper Co. (1936) 84 Fed. (2nd) 633.

*New Jersey*

McDonald v. Royal Indemnity Co. (1932) 109 N. J. L. 308, 162 Atl. 620.

*New Mexico*

No cases.

*New York*

Schencke Piano Co. v. Philadelphia Casualty Co. (1915) 216 N. Y. 662, 110 N. E. 1049.

*Auerbach v. Maryland Casualty Co. (1923) 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.

*Streat Coal Co. v. Frankfort General Ins. Co. (1923) 237 N. Y. 60, 142 N. E. 352.

Best Building Co. v. Employers Liability Assur. Corp. (1928) 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464.

*North Carolina*

Wynnewood Lumber Co. v. Travelers' Ins. Co. (1917) 173 N. C. 269, 91 S. E. 946.

State Automobile Ins. Co. v. York (1939) 104 Fed. (2nd) 730.

*North Dakota*

No cases.

*Ohio*

No cases.

*Oklahoma*

No cases.

*Oregon*

No cases.

*Pennsylvania*

*Schmidt Brewing Co. v. Travelers' Ins. Co. (1914) 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (NS) 126.

*Rhode Island*

No cases.

*South Calorina*

**Tiger River Pine Co. v. Maryland Casualty Co. (1931) 163 S. C. 229, 161 S. E. 491.

**Tyger River Pine Co. v. Maryland Casualty Co. (1933) 170 S. C. 286, 170 S. E. 346.

Blue Bird Taxi Corp. v. American Fid. & Cas. Co. (1939) 26 Fed. Supp. 808.

*South Dakota*

No cases.

*Tennessee*

**Aycock Hosiery Mills v. Maryland Casualty Co. (1928) 157 Tenn. 559, 11 S. W. (2nd) 889.

Noshey v. American Automobile Ins. Co. (1934) 68 Fed. (2nd) 808.

*Texas*

**Stowers Furniture Co. v. American Indemnity Co. (1929) 15 S. W. (2nd) 544.

**Universal Automobile Ins. Co. v. Culberson (1932) 54 S W. (2nd) 1061.

*Utah*

No cases.

*Vermont*

Johnson v. Hardware Mut. Casualty Co. (1938) 108 Vt. 269, 187 Atl. 788.

*Virginia*

No cases.

*Washington*

No cases.

*West Virginia*

No cases.

*Wisconsin*

Wisconsin Zinc Co. v. Fidelity & Deposit Co. (1916) 162 Wis. 39, 155 N. W. 1081, Ann. Cas. 1918C 399.

**Hilker v. Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413.

**Ballard v. Ocean Accident & Guarantee Co. (1936) 86 Fed. (2nd) 449.

*Wyoming*

No cases.

## *II. Failure to Defend and Improper Defense*

It has been held that the insurer will be liable beyond the policy limits for a failure to settle or for the presentation of an improper defense, provided:

(a) The insurer was guilty of bad faith, or

(b) The insurer was guilty of negligence.

### *A. Bad Faith, a Basis of Liability for Failure to Defend and Improper Defense*

The courts in the following cases have discussed the insurer's bad faith in relation to its failure to defend or to present a proper defense, although in the cases indicated by an asterisk, bad faith apparently was not an issue. In the other cases, not bearing an asterisk and set out in the immediately following list, the courts have asserted the existence of liability when bad faith was present.

### *List of Cases on Bad Faith in Relation to Defense*

Note: *Bad Faith not an issue.

*Alabama*

No cases.

*Arizona*

No cases.

*Arkansas*

No cases.

*California*

No cases.

*Colorado*

No cases.

*Connecticut*

No cases.

*Delaware*

No cases.

*District of Columbia*

No cases.

*Florida*

No cases.

*Georgia*

No cases.

*Idaho*

No cases.

*Illinois*

No cases.

*Indiana*

No cases.

*Iowa*

No cases.

*Kansas*

No cases.

*Kentucky*

No cases.

*Louisiana*

No cases.

*Maine*

No cases.

*Maryland*

No cases.

*Massachusetts*

No cases.

*Michigan*
City of Wakefield v. Globe Indemnity Co. (1929) 246 Mich. 645, 225 N. W. 643.
*Minnesota*
No cases.
*Mississippi*
*Farmers Gin Co. v. St. Paul Mercury Indemnity Co. (1939) 187 Miss. 747, 191 So. 415.
*Missouri*
*Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co. (1929) 32 Fed. (2nd) 425.
*Montana*
No cases.
*Nebraska*
Kleinschmit v. Farmers Mut. Hail Ins. Co. (1939) 101 Fed. (2nd) 987.
*Nevada*
No cases.
*New Hampshire*
No cases.
*New Jersey*
No cases.
*New Mexico*
No cases.
*New York*
*Auerbach v. Maryland Casualty Co. (1923) 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.
*North Carolina*
No cases.
*North Dakota*
No cases.
*Ohio*
No cases.
*Oklahoma*
Ohio Casualty Co. v. Gordon (1938) 95 Fed. (2nd) 605.
*Oregon*
No cases.
*Pennsylvania*
No cases.
*Rhode Island*
No cases.
*South Dakota*
No cases.
*Tennessee*
Aycock Hosiery Mills v. Maryland Casualty Co. (1928) 157 Tenn. 559, 11 S. W. (2nd) 889.
*Texas*
No cases.
*Utah*
No cases.
*Vermont*
No cases.
*Virginia*
No cases.
*Washington*
No cases.
*West Virginia*
No cases.
*Wisconsin*
Hilker v Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413.
*Schwartz v. Norwich Union Indemnity Co. (1933) 212 Wis. 593, 250 N. W. 446.
*Ballard v. Ocean Accident & Guarantee Co. (1936) 86 Fed. (2nd) 449.
*Wyoming*
No cases.

### *B. Negligence, a Basis of Liability for Failure to Defend and Improper Defense*

In all the cases set out in the immediately following list, negligence is discussed. In some of such cases, indicated by an asterisk, negligence was not an issue. The courts, in some of the cases in such list, indicated by a double asterisk, have held that negligence alone is a valid basis of liability, while in others, not marked, it is held that negligence, in the absence of bad faith, will not sustain a recovery.

#### *List of Cases on Negligence in Relation to Defense*

Note: *Negligence not an issue.
**Insurer held liable for negligence.

*Alabama*
No cases.
*Arizona*
No cases.
*Arkansas*
No cases.
*California*
No cases.
*Colorada*
No cases.
*Connecticut*
No cases.
*Delaware*
No cases.
*District of Columbia*
No cases.
*Florida*
No cases.
*Georgia*
No cases.
*Idaho*
No cases.

*Illinois*
No cases.
*Indiana*
No cases.
*Iowa*
Getchell & Martin Lumber & Mfg. Co. v. Employers Liability Assur. Corp. (1902) 117 Ia. 180, 90 N. W. 616.
*Kansas*
**Anderson v. Southern Surety Co. (1920) 107 Kan. 375, 191 Pac. 583.
*Kentucky*
No cases.
*Louisiana*
No cases.
*Maine*
No cases.
*Maryland*
No cases.
*Massachusetts*
**Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co. (1917) 240 Fed. 573.
**Abrams v. Factory Mut. Liability Ins. Co. (1937) ... Mass. ..., 10 N. E. (2nd) 82.
*Michigan*
City of Wakefield v. Globe Indemnity Co. (1929) 246 Mich. 645, 225 N. W. 643.
*Minnesota*
*Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp. (1938) 204 Minn. 50, 282 N. W. 481.
*Mississippi*
*Farmers Gin Co. v. St. Paul Mercury Indemnity Co. (1939) 187 Miss. 747, 191 So. 415.
*Missouri*
Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co. (1929) 32 Fed. (2nd) 425.
*Montana*
No cases.
*Nebraska*
Kleinschmit v. Farmers Mut. Hail Ins. Co. (1939) 101 Fed. (2nd) 987.
*Nevada*
No cases.
*New Hampshire*
**Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corp. (1919) 79 N. H. 186, 106 Atl. 604.
*New Jersey*
No cases
*New Mexico*
No cases
*New York*
**McAlleenan v. Massachusetts Bonding & Ins. Co. (1921) 232 N. Y. 199, 133 N. E. 444.
*Auerbach v. Maryland Casualty Co. (1923) 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.
*North Carolina*
Wynnewood Lumber Co. v. Travelers' Ins. Co. (1917) 173 N. C. 269, 91 S. E. 946.
*North Dakota*
No cases.
*Ohio*
No cases.
*Oklahoma*
No cases.
*Oregon*
No cases.
*Pennsylvania*
No cases.
*Rhode Island*
No cases.
*South Carolina*
No cases.
*South Dakota*
No cases.
*Tennessee*
**Aycock Hosiery Mills v. Maryland Casualty Co. (1928) 157 Tenn. 559, 11 S. W. (2nd) 889.
*Texas*
No cases.
*Utah*
No cases.
*Vermont*
No cases.
*Virginia*
No cases.
*Washington*
Sterios v. Southern Surety Co. (1922) 122 Wash. 36, 209 Pac. 1107.
*West Virginia*
No cases.
*Wisconsin*
**Hilker v. Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413.
**Schwartz v. Norwich Union Indemnity Co. (1933) 212 Wis. 593, 250 N. W. 446.
**Ballard v. Ocean Accident & Guarantee Co. (1936) 86 Fed. (2nd) 449.
*Wyoming*
No cases.

### *Abstract of Decisions*
### *Scope*

Hereafter set out is the abstract of the reported United States decisions wherein the courts have considered specifically the ques-

tions of the liability of an insurer beyond its policy limits, arising from a failure either to settle, defend or properly defend the claimant's action against the insured, including a failure to make a complete investigation. It is believed that the cases abstracted are substantially all those available on the subject up to, but not including, volumes of the reporter system as follows:

14 Atlantic (2nd).
112 Federal (2nd).
33 Federal Supp.
21 New York Supp. (2nd).
28 North Eastern (2nd).
293 North Western.
104 Pacific (2nd).
9 South Eastern (2nd).
197 Southern.
142 South Western (2nd).
60 U. S. Supreme Court.

Although all the cases decided by the Federal courts herewith set out do not necessarily reflect the law of the states, they hereafter are cited under the name of the state in which the trial court was sitting.

*Cases by States*

*Alabama*

Neuberger v. Preferred Accident Ins. Co. (1921) 18 Ala. App. 72, 89 So. 90.

Action by the insured under a $5000 automobile liability policy to recover $500 he contributed in making a settlement for $5000 of a judgment for $6500, alleging that the insurer refused to join in the statisfaction of the judgment unless the insured would contribute $500 and pay the costs, and threatened to appeal if the insured did not do so; and that there was no hope of reversal on appeal and the threat was made to compel and coerce the insured to pay an amount which the insurer should pay. *Held,* that there was no duress present and no liability on the insurer; and that there could be no duress as an outgrowth of the exercise of a legal right, viz: the right to appeal.

American Mutual Liability Ins. Co. v. Cooper (1932) 61 Fed. (2nd) 446.

Action by the insured under a $5000 automobile policy to recover the amount of a judgment for $13,500, alleging bad faith in failing to settle. *Held,* that the question of negligent failure to settle not involved, but bad faith shown when insurer:

(1) Before the claimant's suit refused an offer of $3000 without having interviewed the witnesses, but knowing the severity of the injuries, made a counter offer of $200.

(2) Before the submission to jury, refused an offer of $4000 or $4500, though its attorney had advised settlement, and made a counter offer of $3500, insisting the insured must pay the balance,

and that a refusal of a peremptory instruction for the defendant was proper, the court saying:

"In our opinion the insurer cannot escape liability by acting upon what it considers to be fair for its own interest alone, but it must also appear that it acted in good faith and dealt fairly with the assured. * * * We are of the opinion that this relationship imposes upon the insurer the duty, not under the terms of the contract strictly speaking, but because of and flowing from it, to act honestly and in good faith toward the insured. * * * The insurer failed to interview the witnesses, or to make any effort to determine whether there was any liability upon the claim asserted against the insured for damages. It did not attempt to acquaint itself with the extent of Mrs. Auman's injuries. It was not in a position to act intelligently or in fairness to the insured in considering the offer of settlement made before suit was brought. It ignored the advice of its counsel to settle before the case came on for trial. * * * It finally rejected a reasonable offer of settlement within that limit (of the policy) because the insured would not assume a part of its contract liability."

*Connecticut*

Bartlett v. Travelers Ins. Co. (1933) 117 Conn. 147, 167 Atl. 180.

Action by a judgment creditor of an insured under a $10,000 automobile liability policy, the limit having been reduced to $3750 by payments to other claimants, to recover the amount of a judgment of $10,000, alleging bad faith in that the payments to the other claimants preferred them over the plaintiff and constituted an inequitable distribution. The plaintiff contended that the policy did not authorize the insurer to make and pay compromise settlements and have credit for the amount in diminution of its total liability. *Held,* that under the subro-

gation statute authorizing such suit, the plaintiff could recover no more from the insurer than the protection afforded to the insured; and that, as there was no showing of negligence or bad faith in the settlements, no liability beyond the policy limits could be imposed, the court saying:

"A claimant's rights under the statute are obtained by subrogation to the assured, and equally with him subject to the provisions of the policy contract, including the privilege of settlement. * * *

"The duty incumbent upon the insurer in the premises, under such a policy, is recognized, in that it is generally held liable to the assured for fraud or bad faith in failing or refusing to compromise or settle claims within the policy limit. 'Where the insured is clearly liable and the insurer refuses to make a settlement, thus protecting the insured from a possible judgment for damages in excess of the amount of the insurance, the refusal must be made in good faith and upon reasonable grounds for the belief that the amount required to effect settlement is excessive.' * * * Some courts hold, further, that, where the policy forbids the assured from assuming any liability or settling any claim, and reserves to the insurer the right of settlement, the insurer becomes the agent of the assured for the purpose of handling such claims, and will be held to that degree of care and diligence which a person of ordinary care and prudence would exercise in the management of his own business, and if, in failing or refusing to compromise or settle a claim brought against the assured for an amount within the policy limit, it does not meet this standard of care and diligence, it is liable, on the ground of negligence, to the assured for the excess of the judgment over the policy limit."

Hoyt v. Factory Mut. Liability Ins. Co. of America (1935) 120 Conn. 156, 179 Atl. 842.

Action by an insured under a $5000 automobile liability policy to recover $2300, being the amount for which judgment was rendered in excess of the policy limit, alleging negligence and bad faith in failing to settle. It was shown that the claimant offered to settle for $1300 before filing suit, and for $4500 before trial. *Held,* that no negligence was shown as a matter of law, and, therefore, the insured was not liable, the court saying:

"In situations analogous to that presented by this case, courts have applied varying standards by which to determine whether or not an insurer is liable to an insured for failing to settle a claim. These may be generally summarized as a requirement of good faith and honest judgment on the part of the insurer or one that the insurer should use the care and diligence which a person of ordinary prudence would exercise in the management of his own business. * * * The trial court concluded that the defendant had not failed to meet either of these tests. If it was correct as to the more exacting of the two, that is, the requirement of reasonable care, there is no need now for us to decide whether one test or the other should be adopted in this jurisdiction as determinative of the obligations of an insurer in such a case."

*Florida*

Auto Mut. Indemnity Co. v. Shaw (1938) 134 Fla. 815, 184 So. 852.

Action by a judgment creditor of the insured to recover the amount of a judgment of $9500, alleging bad faith in failing to accept an offer to settle for $5000, the limit of an automobile policy, when the insurer knew that liability existed and knew the extent of the injuries. *Held,* after citing cases involving failure to defend, negligence in defending and bad faith in failing to defend with apparent approval, that bad faith was not shown by the evidence; and that recovery only within limits of the policy could be had.

*Indiana*

Kingan & Co. v. Maryland Casualty Co. (1917) 65 Ind. App. 301, 115 N. E. 348.

Action by the insured under a $5000 public liability policy. The insured, after paying the judgment of $7500, sought recovery of the amount paid, alleging failure to settle for $4000 before suit commenced and $6000 after suit commenced. *Held,* after citing cases involving fraud in failing to settle with apparent approval, that fraud had not been pleaded or shown and hence no recovery beyond the policy limits could be had.

*Iowa*

Getchell & Martin Lumber & Mfg. Co. v.

Employers Liability Assur. Corp. (1902) 117 Ia. 180, 90 N. W. 616.

Action by an insured under a $1500 employer's indemnity policy to recover $5300, being the amount of a judgment recovered by an employee, alleging insurer expressly agreed to appeal and negligently failed to do so. *Held,* that it was doubtful liability arose from a failure to appeal, if counsel thought it inadvisable; that liability, if any, must be predicated upon the agreement to appeal; that the insurer was chargeable with any negligence of an attorney it employed; that the judgment of the court in the original action was presumptively correct; that the employer cannot recover in the absence of proof of damage; and that the judgment in favor of plaintiff for the amount in excess of the policy limits be reversed.

*Kansas*

Anderson v. Southern Surety Co. (1920) 107 Kan. 375, 191 Pac. 583.

Action by the insured under a $5000 employer's liability policy for damages in excess of the policy limits, arising by reason of a judgment for $8650, alleging negligence in failing to settle for $4500 and in failing to present the defense that the employee was acting in violation of law. *Held,* that the failure to present the defense was such negligence as to subject the insurer to liability in excess of its policy; and that a judgment for the plaintiff be affirmed.

*Kentucky*

Fidelity & Casualty Co. v. Stewart Dry Goods Co. (1925) 208 Ky. 429, 271 S. W. 444.

Action by the insured under a $5000 elevator policy to recover $8500, being the amount of a judgment of $10,000 less $1500 which the insured had offered to contribute toward an offer of $6500 made before trial, but to which the insurer, claiming its liability in any event could not exceed $5000, refused contribution. The claimant recovered on the grounds of illegal employment and negligence, the policy not covering the former ground. The insured alleged fraud and bad faith in failing to make the settlement. *Held,* that the insured had the right to make the settlement for $6500 and then recover from the insurer the limit of its policy if the policy covered the risk, but the insured could not refuse the settlement and then recover from the insurer because it refused to pay the limit of its policy when it was not liable at all if the claimant was illegally employed. Fraud and bad faith not having been proved, the judgment for the plaintiff was reversed, and the action remanded.

Georgia Casualty Co. v. Mann (1932) 242 Ky. 447, 46 S. W. (2nd) 777.

Action by the insured under a $5000 automobile policy to recover the amount of a judgment of $6500, alleging negligence in failing to settle for $3500 or $4000. *Held,* after citing three classes of cases, namely, those holding (1) that failure to settle imposes no liability beyond the limits of the policy, (2) that no liability exists in the absence of bad faith, and (3) that negligence in failing to settle imposes liability on an insurer, that no negligence, but only an error of judgment had been shown and consequently recovery beyond the limits of the policy would not lie; and that the judgment for the plaintiff be reversed and the action remanded, the court saying:

"* * * The ground on which liability is predicated for mere negligence is that the insurance company having exclusive control of the litigation, and the sole right to settle, is the agent of the insured, and therefore charged with the duty of exercising that degree of care that an ordinarily prudent person in his situation would exercise. At the outset it must not be overlooked that the insurance company is something more than the mere agent of the insured. Under the contract it occupies a twofold relation, one as insurer and the other as agent of the insured, and may look to its own interests as well as those of the insured, and what would be considered a compromise from the standpoint of the insured might not be a compromise from the standpoint of the insurance company. Then, too, the rule imposing on the agent liability for his failure to exercise ordinary care, diligence, and skill in attending to the work of his principal does not ordinarily apply to mere errors of judgment after he has ascertained the facts."

The opinion indicates that liability beyond policy limits for failure to settle must be predicated on bad faith, but states that evidence of bad faith had not been presented, the court saying:

"In announcing this conclusion we do not mean to be understood as holding that under no circumstances may an insurer

incur liability in excess of the limit fixed by the policy for its refusal to settle. The agent is always under the duty to exercise the utmost good faith towards his principal, and we agree with the courts that hold that, if an insurer in refusing to settle acts in bad faith, it may become liable in excess of the policy limit. What facts will constitute bad faith need not now be determined. It is sufficient for the purpose of this case to say that neither the facts pleaded nor proved showed bad faith on the part of the insurance company, and that its motion for a peremptory instruction should have been sustained."

*Louisiana*

New Orleans & C. R. Co. v. Maryland Casualty Co. (1905) 114 La. 153, 38 So. 89, 6 L. R. A. (NS) 562.

Action by the insured under an employer's liability policy to recover the difference between $800, the amount for which the claim could have been settled, and $1300, for which a judgment was rendered. The limit of the policy is not disclosed, but it apparently was $800. *Held,* that in the absence of bad faith and unintelligent action, the insurer was not liable beyond $800, and there could be no recovery.

Davis v. Maryland Casualty Co. (1931) 16 La. App. 253, 133 So. 769.

Action by the insured under a $2500 automobile policy to recover the amount paid above the policy limits contributed by the insurer in satisfaction of a judgment of $3607.30, alleging that the insurer's insistence upon appealing rather than making settlement for the policy limits constituted bad faith. *Held,* that all that is required of an insurer in contesting a claim is good faith, and exercising a contractual right of appeal cannot be held to constitute bad faith; and that a judgment for the defendant be affirmed.

*Maine*

Rumford Falls Paper Co. v. Fidelity & Casualty Co. (1899) 92 Me. 574, 43 Atl. 503.

Action by the insured under a $1500 employer's liability policy to recover for expenditures made in settlement of a judgment of $2500, alleging failure to settle for $1000, but principally claiming that the terms of the policy extended the limit beyond $1500. *Held,* that a recovery beyond $1500 should not be allowed, the court saying:

"* * * On the other hand, if the policy should be construed to impose upon the defendant company the obligation either to pay the assured the sum of $1500, accept the employee's offer of settlement, or defend the legal proceedings, at the peril of being compelled to pay the full amount of any judgment for damages and costs that might be recovered, it is to be feared that the assured, being in most instances under no liability to pay any part of the damages, would have little incentive to defend against the claims of injured laborers, however devoid of legal merit."

*Massachusetts*

Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co. (1917) 240 Fed. 573.

Action by the insured under a $5000 employer's liability policy to recover the amount of a judgment for $17,343.81, alleging negligence in defense because material evidence delivered to the defendant was lost and negligence in failure to negotiate for a possible settlement of $4000 or to report to the insured the possibility of a settlement. *Held,* that the fact that the insurer under its policy was not bound to defend was not material; that the insurer in defending was not the agent of the insured but its status was rather that of an independent contractor; that the insurer's responsibility did not depend alone upon its acts prior to the employment of the attorney, but might arise from acts and omissions which occurred during the preparation for trial and the trial of the action; that the case should be tried upon the theory both of negligence preparation and trial and negligent failure to settle; and that because evidence in support of both theories was not submitted, the judgment for the plaintiff for a part of his demands should be reversed and a new trial granted.

Abrams v. Factory Mut. Liability Ins. Co. (1937) ___ Mass. ___, 10 N. E. (2nd) 82.

Action by the insured under a $5000 automobile policy to recover the amount of $2500 paid by insured over and above $5000 paid by insurer in settlement of a $15,000 judgment, to the satisfaction of which the insurer contributed $5000, alleging negligence in investigation, preparation for trial, and trial, and willful refusal and negligent failure to settle for $5000. *Held,* that an insurer has a right to defend for its own advantage, even though from the standpoint of the in-

sured, when a conflict of interests exists, a different course would have been preferable; that an error of judgment cannot form the basis of recovery for failure to settle, but negligence in that regard may warrant recovery; that recovery may be predicated on negligence in the preparation for trial and trial of an action; and that a demurrer should have been overruled.

*Michigan*

City of Wakefield v. Globe Indemnity Co. (1929) 246 Mich. 645, 225 N. W. 643.

Action by the insured against an automobile liability insurer for $5000, the amount in excess of a $10,000 policy on a $15,000 judgment, alleging negligence and bad faith in failing to settle for $4324 and negligent presentation of the defense.

It was claimed that the insurer negligently defended because it failed to make the point that the operation of a bus line was ultra vires of the city, and therefore was not liable for the injury. *Held,* that the city officials having objected to the defense and having acquiesced in its abandonment, the insured was estopped from raising the point later; that negligence is not a basis of recovery for a failure to settle; and that bad faith may not result alone from an insurer's refusal to settle after being advised by its trial attorney to do so; and that a judgment for the defendant should be entered, the court saying:

> "It seems very plain that the exclusive power to control settlements within the amount of the policy is ceded to the insurer for its sole benefit, to save itself, as far as may be, on account of its engagement to insured. Because of its purpose, the power is to be used according to the judgment and discretion of the insurer, and therefore, in attempting exercise of the power, it is not performing, or assuming to perform, a legal duty to insured, either express or implied. Without such legal duty, the obligation to use due care in the exercise of the power cannot be imposed by law.
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> "* * *
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> "We think the rule adopted by the great weight of authority is in harmony with the contract of the parties and should be followed. Defendants are not liable to plaintiff for refusal to compromise Borshi's claim, unless the refusal was in bad faith.
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> "* * *
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> "Undoubtedly the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or, upon reasonable grounds, that the compromise amount is excessive, or if it has legal defenses, as yet undertermined by a court of last resort, which fairly seem applicable, * * *. There may be other bona fide reasons for refusal to compromise. On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad fath."

*Minnesota*

Mendota Electric Co. v. New York Indemnity Co. (1926) 169 Minn. 377, 211 N. W. 317.

Action by the insured under a $5000 public liability policy to recover the amount of $1125 it had contributed in addition to the contribution by the insurer of $3625, all less than the policy limits, alleging bad faith in refusing to pay more than $3625. *Held,* citing with approval cases holding the insurer to have exclusive right to settle if it acts in good faith, and that it is liable for negligent defense, that, since the right of recovery of the claimant was apparent, recovery might be had because the refusal to contribute the full amount of the policy was arbitrary; and that the order overruling the demurrer was improper.

On appeal from a judgment for the plaintiff, in Mendota Electric Co. v. New York Indemnity Co. (1928) 175 Minn. 181, 221 N. W. 61, the court held that no bad faith was shown and a judgment for the defendant was directed, saying:

> "But it takes something more than error of judgment to create liability. There must be bad faith with resulting injury to the insured before there can be a cause of action."

Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp. (1938) 204 Minn. 50, 282 N. W. 481.

Action by the insured under a $7500 automobile policy to recover $2000 contributed by the plaintiff in settlemnet of a $10,000 judgment, to which settlement the defendant contributed $7500, alleging bad faith in refusing before trial to pay more than $4500 in settlement of a $6500 offer. *Held,* that the evidence showed no negligence in the preparation for trial of the action, and although liability would arise if an insurer was guilty of bad faith in refusing to settle, such was not shown to exist and no recovery could be had.

Norwood v. Travelers Ins. Co. (1939) 204 Minn. 595, 284 N. W. 785.

Action by the insured under a $5000 automobile policy to recover the amount remaining unpaid on a $7500 judgment after the insurer had paid the limit of its policy, alleging bad faith in failing to settle or to inform insured of opportunity to settle within the policy limits after judgment was obtained. *Held,* after citing cases holding that liability beyond the policy limits might be predicated upon bad faith or negligence, that bad faith had not been shown by the evidence only of a failure to notify the insured of the offer to settle; and that, therefore, no recovery could be had.

*Mississippi*

Georgia Casualty Co. v. Cotton Mills Products Co. (1931) 159 Miss. 396, 132 So. 73.

Action by the insured under a $10,000 employer's liability policy to recover $2500 contributed toward the satisfaction of a $12,500 judgment, alleging negligence in failing to settle for $9000 after the judgment was rendered. *Held,* that, in the absence of a showing of fraud or bad faith, no liability beyond the policy limits existed, the court saying:

> "As we view this language, taking the whole contract, and considering it together, it only means that the insurer had an option to settle if it so desired; but the time when it might do so, and the amount of its liability, was fixed as being after a final judgment had been rendered against the insured, and the amount thereof paid by it.
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> "* * *
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> "It is clear that there was no obligation assumed by the insurer to settle the lawsuit; so that no duty, or breach thereof, existed by virtue of the contract; neither is there any such implication. The whole contract, taken together, negatives that idea, in that the amount to be paid, on account of injury or death, to one person, is limited to ten thousand dollars. In this case the court has held the insurer liable for the excess judgment rendered by the court, less the amount which the insured offered to contribute in order to obtain a settlement.
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> "This reasoning of the court (Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corp. 79 N. H. 186, 106 Atl. 604 and others) which we have cited is tantamount, in effect, to declaring that, notwithstanding both parties to the contract have agreed that the insurer's liability shall be limited, yet, if by mistake of law or fact the insurer litigates, and there is a final judgment for more than the case could have been settled for, and in excess of the agreed limit of liability, the insurer, by reason of its want of judgment or prescience as to what will occur in the courts in future, has neglected its duty, although it has in good faith litigated and performed both the letter and the spirit of its contract.
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> "Negligence cannot be predicated upon a failure to exercise an option or reservation made for the benefit of the optioner,"

and that a judgment for the defendant should be entered.

Farmers Gin Co. v. St. Paul Mercury Indemnity Co. (1939) 187 Miss. 747, 191 So. 415.

Action by the insured under a $5000 public liability policy to recover $2500, the amount which a $7500 judgment exceeded the policy limits, alleging negligence and bad faith in failing to settle for $4000. *Held,* after citing Georgia Casualty Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73, that a peremptory instruction for the defendant was proper, since no bad faith had been shown, the court saying:

> "In the absence of proof of a refusal to properly investigate the case, or conduct defense of it fairly, without willful oppression, or arbitrary action in refusing to settle the case was so unreasonable as to constitute fraud, there can be no liability on the policy beyond the limits therein agreed by the parties thereto."

*Missouri*

Mears Mining Co. v. Maryland Casualty Co. (1912) 162 Mo. App. 178, 144 S. W. 883.

Action by the insured under a $5000 employer's liability policy to recover $5,203.35 paid by it in satisfaction of a $7000 judgment. The insurer refused to pay more than five-sevenths of the settlement, claiming it was entitled to share on its coverage the amount saved by compromise. *Held,* that the insurer was liable to the full limit of its policy and not merely a pro rata amount of the judgment; and that a judgment for the plaintiff should be affirmed, the court saying by way of dictum:

> "Of course, the appellant (the insurer) had the right to contest the suit, and was not responsible because the judgment was in excess of the $5000 covered by the policy, notwithstanding the suit might have been compromised for a less sum."

Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co. (1929) 32 Fed. (2nd) 425.

Action by the insured under a $5000 employer's liability policy to recover from the insurer the amount of the policy coverage as contribution in satisfaction of a judgment for $12,500, alleging negligence in defending, consisting of failure to supersede the judgment and failure to notify the assured in proper time for it to do so. The motion for a new trial having been overruled December 13th, on December 24th the insurer wrote the insured notifying it of such fact, and asking that it join in the execution of a supersedeas bond. The request to supersede was unintelligible and to prevent levy of execution, which was made on the day the letter was received, the insured paid the full amount of judgment. *Held,* that the insured could recover the limit of the policy, the court stating by way of dictum that negligence and bad faith might be the basis of recovery beyond the policy limits.

St. Joseph Transfer & Storage Co. v. Employers Indemnity Co. (1930) 224 Mo. App. 221, 23 S. W. (2nd) 215.

Action by the insured under a $10,000 employer's liability policy to recover $2600 it had contributed along with $6600 paid by the insurer under an agreement, between the insured and the insurer, to settle a claim of an employee before trial, alleging bad faith in refusing to pay the full amount of the settlement, since it was within the limit of the policy. *Held,* after citing the cases holding the insurer not liable in the absence of bad faith, that no bad faith resulted from the insurer's refusal to pay, within its policy limits the full amount of the judgment; that public policy is served by compromise; and that a judgment for the plaintiff be reserved, the court saying:

> "The cases holding the insurance company liable for negligent failure to settle, when a settlement may be made for an amount covered by the policy, and that the company is liable if it coerces the plaintiff into contributing toward such settlement, proceed upon the theory that good faith and due care require an insurance company, after taking over the defense of the action, to look after the interests of the assured to the same extent that an agent must guard the interests of his principal, and that a trustee must guard the interests of his cestui que trust. We fully agree that the insurance company must act with due care; but it would be a perversion of the purpose of the provisions in the policy permitting the insurance company to control the defense and settle or refuse to settle, to the exclusion of the assured, to hold that under these provisions the insurance company must consult the interests of the assured to the exclusion of its own interest. It is obvious these clauses were inserted for the protection of the insurance company, by placing it beyond the power of the assured to conduct the litigation, or make a settlement, whereby the interests of the insurance company would be sacrificed. Good faith requires that the insurance company do nothing to the prejudice of the assured which is not beneficial to itself; but, when the interests of the insurer and the assured conflict, then there is no duty to the assured, except that for which it has expressly contracted."

Maryland Casualty Co. v. Cook-O'Brien Const. Co. (1934) 69 Fed. (2nd) 462.

Action by the insurer upon an indemnity agreement made by insured, agreeing to indemnify the insurer for executing an appeal bond superseding a judgment rendered against the insured for $12,000, against loss beyond the $5000 employer's liability policy limits. The insured pleaded set-off based on the insurer's bad faith in refusing to settle for less than the policy limits prior to trial. *Held,* after expressing approval of the doctrine that bad faith must be shown before

there can be a recovery, that the claim adjuster's acts and statements to the effect that the case was dangerous and should never go to trial, and that a settlement for $3500 should be made, but that insured must pay $1000 (which it refused to do), constituted bad faith.

Maryland Casualty Company v. Elmira Coal Co. (1934) 69 Fed. (2nd) 616.

Action by the insured under a $5000 employer's liability policy to recover the amount paid by the insured in excess of the policy limits on a $10,000 judgment, alleging bad faith in failing to settle for less than $1000. *Held,* that under the facts recovery based upon bad faith in refusing a settlement, would lie, the court saying:

> "With full knowledge that Thompson was seriously injured in the first accident and with only a superficial and casual investigation as to the facts, defendant, by its letter of December 15, demanded that plaintiff procure a release from Thompson for the amount of his doctor and hospital bill. As has been observed, defendant failed to pay the doctor bill sent it, and apparently was giving consideration to these bills about a year after they had been incurred. Thompson offered to settle with the representative of defendant for injuries received in his first accident for $366 and his medical expense, but this was declined. He offered to settle with defendant for both injuries, before he had brought suit, for $1000. Early in July, 1926, defendant's adjuster reported to his superior that, 'I do not think that there is any doubt about the man being seriously injured.'
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> "In this record, the jury might well have believed that * * * its refusal to settle was not based upon an intelligent judgment because it had never in good faith determined for itself whether plaintiff's claims should have been settled."

McCombs v. Fidelity & Casualty Co. of New York (1936) 231 Mo. App. 1206, 89 S. W. (2nd) 114.

Action by the insured under a $5000 automobile liability policy to recover $5000 contributed by the insured with $5000 paid by the insurer in satisfaction of a $13,000 judgment, alleging negligence and bad faith of the insurer in refusing a settlement of $5000, when the insurer's attorney admitted that liability existed and serious damages had been sustained, but said the insurer would not pay the limit of its policy in settlement. *Held,* after reviewing the authorities on liability predicated upon negligence and bad faith, that the insurer is responsible on the grounds of bad faith; that the judgment for the plaintiff be affirmed, the court saying:

> "As an experienced attorney he (insurer's attorney) saw nothing but disaster in the trial of the suit, and accordingly advised his company to pay the limit of the policy in settlement of the suit. Still the company refused to settle, putting its refusal on the ground that there was an element of chance that the insured might win, and that it was the policy of the company never to settle for the limit of its liability. In so doing the company obviously ignored its obligations arising from the agential relationship between itself and the insured created by its contract. It is difficult to escape the conclusion that the company proceeded on the theory that by the terms of the contract it had the insured tied hand and foot, and thereby sought to coerce the insured into contributing a portion of its own liability in settlement of the suit so as to avoid being compelled to pay a larger sum through a verdict and judgment, which every one concerned realized would result from a trial of the suit, unless by chance the insured might win. The evidence of bad faith on the part of the defendant in refusing to settle is ample,"

and that St. Joseph Transfer & Storage Co. v. Employers' Indemnity Corp., 224 Mo. App. 221, 23 S. W. (2nd) 215 is distinguishable because therein an agreement to contribute existed.

*Nebraska*

Kleinschmit v. Farmers Mut. Hail Ins. Co. (1939) 101 Fed. (2nd) 987.

Action by a claimant to recover the amount of his judgment of $9000, alleging bad faith and negligence in failing to defend under a $5000 automobile policy or to accept the claimant's offer to settle for $4200. The insurer based its right not to defend upon the insured's lack of cooperation and a breach of contract by the insured. *Held,* that a claim by the insurer that the insured had

changed his residence without notice and without having paid the difference in premium being founded on evidence did not amount to bad faith; that a failure to disclose to the insured the receipt of an offer to settle would not sustain the plaintiff's cause of action because without other evidence a failure to settle or to give notice of an offer was not required by the policy; and that the judgment for the defendant be affirmed.

*New Hampshire*

Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corp. (1919) 79 N. H. 186, 106 Atl. 604.

Action by the insured under a public liability policy to recover $3000 it was compelled to pay, alleging negligence in preparation for trial, in defense of the action and in failing to settle within the policy limits. *Held,* that a duty to settle arose if that was a reasonable thing to do; and that the insurer's objections to the judgment for the plaintiff be overruled, the court saying:

> "* * * When the defendant assumed control of the Blais claim, it then and there became its duty to do what the average man would do in a similar situation."

Douglas v. United States Fidelity & Guaranty Co. (1924) 81 N. H. 371, 127 Atl. 708, 37 A. L. R. 1477.

Action by the insured under a $5000 employer's liability policy to recover the amount of a judgment for $13,500, alleging negligence in failing to accept an offer to settle for $1500. *Held,* that when the insurer takes over all the right to settle, it is subject to liability for a failure to display "the conduct of the average man in carrying on negotiations for a settlement," and may not be excused upon the theory that it possessed, under the policy, an option to settle; and that recovery for the full amount of the judgment should be affirmed.

Maryland Casualty Co. v. Wyoming Valley Paper Co. (1936) 84 Fed. (2nd) 633.

Action by the insured under an employer's liability policy to recover $5000 paid by the insured after contribution by the insurer of a like amount on a $10,000 judgment, alleging negligence in not making a settlement before trial for $2000, or after trial for $7000. *Held,* that the insurer's counsel knew or should have known that liability existed; that negligence existed in the investigation and preparation; and that the judgment for the plaintiff be affirmed.

*New Jersey*

McDonald v. Royal Indemnity Co. (1932) 109 N. J. L. 308, 162 Atl. 620.

Action by the insured under an automobile policy to recover the amount of a judgment of $20,000 (apparently in excess of the undisclosed limits of the policy), alleging negligence in failing to settle for $2000 and later for $3500. *Held.*

> "The defendant appears to have done exactly what it was called upon to do under the terms of its policy. Nor is there any evidence that it defended the lawsuit growing out of the automobile accident in a negligent and careless manner. It did not agree to and was not obligated to settle by the payment of money the action brought against the assured. The allegations of negligence in the complaint were not proved at the trial,"

and that a recovery beyond the policy limits be not allowed.

*New York*

Schencke Piano Co. v. Philadelphia Casualty Co. (1915) 216 N. Y. 662, 110 N. E. 1049.

Action by the insured under a $5000 employer's liability policy to recover $5543.94 contributed by it with $5000 paid by the insurer in satisfaction of $10143.93, alleging negligence in failing to settle within the policy limits, but not charging bad faith. *Held,* that in the absence of fraud or bad faith, no recovery beyond the limits of the policy may be had; and that the judgment for the defendant be affirmed.

Brunswick Realty Co. v. Frankfort Ins. Co. (1917) 99 Misc. 639, 166 N. Y. S. 36.

Action by the insured under a $5000 employer's liability policy to recover $3000 contributed by it with the insurer who contributed $5000 in satisfaction of an $8000 judgment, alleging bad faith in refusing to settle before judgment for $5000 or permitting the insured to settle, even though the insurer knew the probability that a judgment in excess of $5000 would be obtained. *Held,* that mere failure to settle is not a basis of recovery, but the allegations showing bad faith are sufficient and the defendant's motion for a judgment on the pleadings be denied.

McAleennan v. Massachusetts Bonding &

Ins. Co. (1921) 232 N. Y. 199, 133 N. E. 444.

Action by the insured under a $5000 automobile policy to recover payments made in excess of the $5000 policy limit, alleging negligent failure to appeal from an adverse judgment of $13,000. It appeared that the insurer had specifically agreed to appeal, and, relying on such promise, the insured did not do so. *Held,* that insurer was liable for damages occasioned by its negligent breach of contract to appeal and that such damages were not merely nominal and were the proper subject of determination by the trial court, which awarded damages for the full amount in excess of the policy limit; and that a judgment for the plaintiff be affirmed.

Auerbach v. Maryland Casualty Co. (1923) 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.

Action by the insured under a $5000 automobile policy to recover $14,000, the difference between $15,500 it did pay in satisfaction, with the insurer, of judgments for $20,500, and $1500 it would have paid if an offer of $6500 had been accepted, alleging that the insurer, knowing the desirability of the offer of settlement, refused to consummate it. *Held,* that in the absence of a charge or proof of negligence in investigating or in defending and of bad faith or misrepresentation, an action does not lie to recover beyond the policy limits; that in refusing to settle the insurer did what it had a right to do; and that a judgment for the defendant be entered, the court saying:

> "There are no allegations in the complaint to the effect that the insurance company was negligent either in investigating the facts connected with the accident or in the defense of the action, not a suggestion that it was guilty of fraud or misrepresentations in any way. * * * There is nothing in the policy by which the insurance company obligated itself to settle, if an opportunity presented itself. It was given the option to settle, if it saw fit to do so, or to try the action, as it preferred. It, however, was under no legal obligation, either express or implied, to compromise or settle the claims prior to trial."

Streat Coal Co. v. Frankfort General Ins. Co. (1923) 237 N. Y. 60, 142 N. E. 352.

Action by the insured under a $5000 public liability policy to recover $2436.34 contributed by it with $5752.42 paid by the insurer in satisfaction of a judgment for $9097.66, alleging a breach of duty in failing to notify the insured of an offer to settle for $5000. *Held,* that if it had known of the offer, the insured did not have the right to settle; that no bad faith being alleged or proved, the insurer was not liable beyond the limits of its policy; and that a judgment for the plaintiff be reversed.

Best Building Co. v. Employers Liability Assur. Corp. (1928) 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464.

Action by the insured under a $10,000 employer's liability policy to recover $6000 it contributed toward the settlement of a $16,000 judgment, less $2000 which it was willing to contribute to a $6500 settlement, alleging negligence in failing to settle. *Held,* that no liability rested on the insurer for failure to settle in the absence of a showing of bad faith; and that the judgment for the defendant be affirmed, the court saying:

> "That the insurance company in the handling of the litigation or in failing to settle is liable for its fraud or bad faith is conceded and has been repeatedly stated in all cases bearing on the subject. * * *. In most of the accident cases, disputed questions of fact arise. Is the insurance company to determine at its peril whether reasonable-minded men would believe the plaintiff's witnesses in preference to its own? Again, even on conceded facts, as frequently happens, a serious question of law arises as to the nature or extent of liability, if any. Is a jury to say that the insurance company was guilty of negligence in choosing to try out such a question in the courts rather than to settle? These questions suggest the wisdom of adhering to the contract of insurance which the parties have made. If the insurance company is to be obligated to make a settlement under any given circumstances, it must be a matter to be dealt with between the insured and the insurer, or else regulated by the legislature."

*North Carolina*

Wynnewood Lumber Co. v. Travelers' Ins. Co. (1917) 173 N. C. 269, 91 S. E. 946.

Action by insured under a $5000 employer's liability policy to recover $5000 contributed by it with $5000 paid by the insurer in satisfaction of a $10,000 judgment, alleg-

ing that the insurer negligently failed to accept offers to settle for $1000 and $2500, and negligently failed to appeal. *Held,* that no cause of action was stated for bad faith or fraud was not alleged; that the fact that defendant failed to appeal did not constitute of itself either a tort or a breach of the implied contract; and that the trial court's dismissal of the plaintiff's cause of action be affirmed.

State Automobile Ins. Co. v. York (1939) 104 Fed. (2nd) 730.

Action in garnishment by a judgment creditor of the insured under a $10,000 automobile policy to recover against the insured as judgment debtor and the insurer the amount of the judgment of $12,000. The insured answered, alleging bad faith and negligence of the insurer in failing to settle within the policy limit. *Held,* that recovery could be predicated on the showing of bad faith or negligence in failing to settle if such were shown, but under the facts adduced, no liability beyond the limit of the policy existed; and that the judgment for the policy limit be affirmed, but that the judgment for the amount in excess of the policy limit should be reversed.

*Ohio*

Cleveland Wire Spring Co. v. General Accident, Fire & Life Assur. Corp. (1917) 6 Oh. App. 344, 27 O. C. A. 536.

Action by the insured under a public liability policy to recover $12,500, the amount of a judgment of $20,000 in excess of the amount at which a settlement could have been made, alleging that bad faith arose from the fact that the insured advised settlement for $7500, because a judgment for more than that amount was probable, but refused to contribute more than $3500. *Held,* that a demurrer should be sustained; that the averments did not show "reckless or contumacious conduct;" that the insurer had the right to consult what it deemed for its own interest in making settlement; and that the facts pleaded did not amount to bad faith.

*Oklahoma*

Boling v. New Amsterdam Casualty Co. (1935) 173 Okla. 160, 46 Pac. (2nd) 916.

Action by the insured under a $5000 automobile policy to recover the amount of a judgment of $20,000 less the contribution of $5000 made by the insurer after garnishment, alleging bad faith in refusing to pay more than $1500 on an offer to accept $6000 after judgment had been rendered. *Held,* that the demurrer to the petition should be overruled, the court saying:

> "It may be stated as a rule of law that where an insurance company agrees to indemnify against loss from personal injury claims, conditioned upon insured's surrendering to the insurance company control of investigation, adjustments of claims, and defenses of lawsuits, and where the insurance company does, pursuant to such contract, take control of such matters, a relationship arises between insured and insurer which imposes on the insurer the duty owing to the insured to exercise skill, care and good faith to the end of saving the insured harmless, as contemplated by the contract to indemnify. The insurer must act honestly to effectually indemnify and save the insured harmless as it has contracted to do—to the extent, if necessary, that it must make whatever payment and settlement as honest judgment and discretion dictate, within the limits of the policy, and an abandonment of this duty to act subsequent to its assumption in part constituted bad faith."

Ohio Casualty Co. v. Gordon (1938) 95 Fed. (2nd) 605.

Action by an insurer for a declaratory judgment as to its rights under a $5000 automobile policy. By cross petition of the insured it was alleged that the insurer acted in bad faith in refusing to defend two damage actions on the ground that the insured's automobile was not covered since it was towing a trailer at the time of the accident. *Held,* that it was adjudicated in the garnishment action that a trailer was not being towed and hence the insurer was liable up to the limits of its policy; that because the insured having reported that a trailer was being towed, the insurer did not act in bad faith when it refused to defend; and that in the absence of bad faith the insurer was not liable beyond the limits of its policy, and no recovery would lie.

*Oregon*

Brown & McCabe, Stevedores v. London Guarantee & Accident Co. (1915) 232 Fed. 298.

Action by the insured under a $5000 employer's liability policy, alleging that the insurer informed the insured that the claimant would settle for $3000, of which the insurer would pay one-half, but if the payments

were not made, a judgment in excess of the policy limits would be entered; and that after judgment for $12,000, the insurer paid $5000, and is indebted for the remainder of $7000. *Held,* that the demurrer should be overruled, the court saying:

> "It has been held that, under a policy like the one in question, the insurance company has a right to settle with an injured employe or not, as it deems advisable, and if it neglects or refuses to do so, and litigates the matter in good faith, and judgment is recovered for more than the face of the policy, it is not liable for the excess. But that is not this case. This is a case where, according to the allegations of the complaint, the insurance company attempted to hold up the assured and make it pay $1500, or one-half the loss, and, because if would not do so, suffered the action to proceed to judgment for more than double the face of the policy."

*Pennsylvania*

Schmidt Brewing Co. v. Travelers' Ins. Co. (1914) 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (NS) 126.

Action by the insured under a $5000 policy against the automobile indemnity insurer for failure to settle within the policy limits prior to trial. It appeared that a compromise of $6000 might have been made, the insured agreeing to pay $1000. The insurer rejected the offer and subsequently a judgment for $9000 was recovered. *Held,* that the insurer was under no obligation to pay in advance of trial, and the decision whether to settle or try was exclusively committed to it.

*South Carolina*

Tiger River Pine Co. v. Maryland Casualty Co. (1931) 163 S. C. 229, 161 S. E. 491.

Action by the insured under a $5000 employer's liability policy to recover the full amount of a $7000 judgment, alleging negligence and bad faith in refusing offers to settle for $100 and $175 made before judgment and for $5000 made after judgment. *Held,* that under the decisions recovery may be had if an insurer, having the exclusive right to settle, negligently or in bad faith refuses an offer to the insured's damage; and that considering the allegations of the petition the demurrer should be overruled.

On appeal from a judgment for the plaintiff in Tyger River Pine Co. v. Maryland Casualty Co. (1933) 170 S. C. 286, 170 S. E. 346, the court held that a jury question as to negligence in failing to settle was presented by evidence as to correspondence passing between the insured and the insurer; and that contrary to the holding in Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. (2nd) 777, bad faith became a question for the jury when it appeared that the insurer with the exclusive right to settle refused to do so within the policy limit, the court saying:

> "The very thing which the appellant in the case which we have before us for determination undertook to do was to hold the respondent harmless in the disposition of Chesser's claim. If, in the effort to do this, its own interests conflicted with those of respondent, it was bound, under its contract of indemnity, and in good faith, to sacrifice its interests in favor of those of the respondent. If the Kentucky rule is the law, then a policy of indemnity such as is before us becomes a delusion and a snare. In the nature of things when there is a conflict of interests—as is inevitably the case in all scuh matters—the company will give the preference to its own."

Blue Bird Taxi Corp. v. American Fid. & Cas. Co. (1939) 26 Fed. Supp. 808.

Action by the insured under a $5000 automobile policy to recover damages sustained by it as the result of an execution to satisfy a $7500 judgment, alleging a notice by the insured to the insurer after a mistrial of the original action that the claim could be settled for $3500, and a demand that the settlement be made, which the insurer ignored. The insured did not post a supersedeas bond and an appeal was not taken. The insurer relied upon the statements of the insured which indicated that it was not liable for the original injury. *Held,* that a motion for a verdict in the defendant's favor should be entered because there was no substantial evidence of wantonness, wilfulness, negligence or utter disregard of the rights of the insured. After quoting from Tyger River Pine Co. v. Maryland Casualty Co., 170 S. C. 286, 170 S. E. 346, the court said:

> "Certainly, this court will not take an isolated expression, drastic in terms, as in-

tended to support a principle which would open the door to fraud of the worst kind, and encourage and promote collusion between officers and employees insured against loss in the framing of actions for damages, and make a demand upon the indemnity company to settle within the indemnification limit on the ground that it was legally entitled to do so under the South Carolina law, as embraced within the expression relied upon by the plaintiff herein."

*Tennessee*

Aycock Hosiery Mills v. Maryland Casualty Co. (1928) 157 Tenn. 559, 11 S. W. (2nd) 889.

Action by the insured under a workmen's compensation policy to recover $5000 awarded as damages in a common law action alleging negligence and bad faith. The evidence showed that in a compensation hearing the claimant's father stated he had not obtained an employment certificate for his minor son, the claimant; that the insurer agreed that it would not raise the point of illegal employment whereby the insurer would be relieved and the insured held; that in an action to recover under the compensation statute, the court found the injury compensable under the statute; that before the award was entered the court house burned, destroying all records; and that after great delay during which the insurer stated it would settle the case according to the statute and the request of the insured, a new action at common law was commenced, resulting in a judgment of $5000. *Held,* that the judgment for the plaintiff should be affirmed, the court saying:

"The facts presented by the record made a clear case of liability. The contract of insurance created a relation out of which grew the duty of the casualty company to exercise, not only good faith, but ordinary care. It assumed defense of the suit brought by the employee under the Compensation Act to the exclusion of the defendant. Instead of disclaiming liability and retiring from the case when it learned of the controversy over the issuance of an employment certificate, it exhibited bad faith in its effort to protect itself at the hazard of its indemnitee by setting up the defense that the employment was illegal. * * * An insurer assuming under its policy to control litigation against the insured must act in good faith and with reasonable diligence and caution."

Noshey v. American Automobile Ins. Co. (1934) 68 Fed. (2nd) 808.

Action by the insured under a $10,000 automobile policy to recover $12,500 paid in satisfaction of a $27,500 judgment, after the insurer had paid $10,000, alleging bad faith in delaying the acceptance of an offer to settle for $10,000 from May until August, when the offer was withdrawn, and in not giving written authority to the plaintiff to negotiate the settlement. *Held,* that a demurrer to the petition should be overruled; that not negligence but bad faith is the test determining the liability of an insurer beyond its policy limits; and that bad faith is made to appear from the allegations as to delay in accepting the offer, in failing to give written consent that the insured might settle when the insurer knew a trial probably would result in a verdict for more than $10,000 as evidenced by its advice to the insured to dispose of his property, and in the misrepresentations made to the claimant as to the financial worth of the insured and the extent of the coverage.

*Texas*

Stowers Furniture Co. v. American Indemnity Co. (1929) 15 S. W. (2nd) 544.

Action by an insured under a $5000 automobile policy to recover $14,000, the amount of a judgment recovered by a claimant against the insured, alleging that the insurer negligently failed to accept the claimant's offer to settle, before trial, for $4000. *Held,* that liability for failure to settle may be predicated upon negligence; and that the trial court's withdrawal of the case from the jury and entering judgment for the defendant be reversed and the cause remanded for a new trial, the court saying:

"The provisions of the policy giving the indemnity company absolute and complete control of the litigation, as a matter of law, carried with it a corresponding duty and obligation, on the part of the indemnity company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the indemnity company.

" * * *.

"* * * we are constrained to believe that the correct rule under the provisions of this policy is that the indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.

"* * *.

"We think, further, that the testimony offered by plaintiff, to the effect that it was a rule of the indemnity company never to make a settlement for more than one-half the amount of the policy, should have been admitted as bearing on the issue of negligence on the part of the indemnity company."

Universal Automobile Ins. Co. v. Culberson (1932) 54 S. W. (2nd) 1061.

Action by the insured under a $5000 automobile policy to recover $10,536.88, alleging that the insurer negligently failed to settle for $4500 before trial. *Held,* that if negligence of an insurer regarding failure to settle is shown, liability may be predicated thereon; and that the judgment in favor of the insured be reversed, but on other grounds, the court saying:

"If the claim of Miss Witt could have been settled for less than the amount called for in the policy prior to the time the judgment was rendered, and if appellant refused to settle said claim, then it would be liable to Culberson for the total amount of the judgment rendered * * *.

*Vermont*

Johnson v. Hardware Mut. Casualty Co. (1938) 108 Vt. 269, 187 Atl. 788.

Action by the insured against his automobile liability insurer for $6600 paid by him on a judgment, alleging that the insurer negligently failed to accept an offer to settle for $5500. *Held,* that negligence was not a basis for recovery in such a case and that bad faith must be shown. On motion to remand and amend the complaint, it was held that there was sufficient evidence of bad faith to go to a jury and it was accordingly remanded with leave to apply for an amendment.

On the second appeal, Johnson v. Hardware Mut. Casualty Co. (1939) 109 Vt. 481, 1 Atl. (2nd) 817, the court held the jury was justified in finding bad faith and the judgment was affirmed, the court saying:

"It was, as we have seen, the established policy of the defendant to settle a claim rather than to meet the possibility of a verdict beyond the limits of the insurance contract; and in view of this, the failure of the adjuster to inform the home office that such a verdict was not only possible, but expected, was evidenced from which the jury could infer that the requisite good faith was not exercised. Such probability, if reported, might well have caused the acceptance of the offer of settlement."

*Washington*

Sterios v. Southern Surety Co. (1922) 122 Wash. 36, 209 Pac. 1107.

Action by the insured under a $5000 automobile policy to recover $13,538.40 he paid in satisfaction of a judgment, alleging negligence on the part of the insurer in failing to perfect an appeal in the original action, after having expressly promised to do so. *Held,* that while not passing upon the subject of whether not to appeal was negligence, there could be no liability in excess of the policy limit where there was no damage shown to have been incurred by the insured resulting from the failure to appeal; and that the judgment for the amount in excess of the policy limit be reversed.

*Wisconsin*

Wisconsin Zinc Co. v. Fidelity & Deposit Co. (1916) 162 Wis. 39, 155 N. W. 1081, Ann. Cas. 1918C 399.

Action by the insured under a $5000 employer's liability policy to recover $7500, which it paid in excess of the policy limit, alleging three causes of action: one merely for failure to settle for $4000 before trial; a second for negligently failing to do so; and a third for fraudulently and in bad faith failing to do so. *Held,* that the demurrers to the first two causes of action should have been sustained, but the third cause of action was not subject to demurrer, the court saying:

"The power of settlement given the insurer cannot be used for the purposes of fraud or oppression, and the courts, in so far as they have passed upon the question, hold that the power conferred must not be exercised in bad faith."

Hilker v. Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413.

Action by an insured to recover $5500 paid by him in excess of the coverage of the policy limit of $5000, alleging bad faith in conducting the defense and in failing to settle for a sum less than $5000. *Held,* after citing with apparent approval cases upholding liability based upon negligent failure to settle, that the judgment of the trial court, grounded upon bad faith in failing to interview known eyewitnesses and to make a settlement within the policy limit, be affirmed; and that the case of Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N. W. 1081 should be overruled insofar as it holds the insurer not to be the agent of the insured for the settlement of claims. On rehearing, reported in 235 N. W. 413, the court adhered to its former opinion, saying:

"The subject has received our earnest reconsideration, and it is to be hoped that what is here said will be characterized by a degree of clarity that will enable the views of this court, upon a question which seems to be in more or less tautological confusion, to be understood. We use the term tautological confusion because our consideration of the authorities leads us to believe that what confusion there is on the part of the courts is purely tautological, and springs from a none too critical use of terms. Terms which are not strictly convertible or synonymous have been used by different courts to indicate the same thing. Negligence has been used by some courts to mean the same thing that other courts have designated as bad faith. Bad faith, expecially, is a term of variable significance and rather broad application. Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto. In other to understand what is meant by bad faith, a comprehension of one's duty is generally necessary, and we have concluded that we can best indicate the circumstances under which the insurer may become liable to the insured by failure to settle by giving with some particularity our conception of the duty which the written contract of insurance imposses upon the carrier." (The court then sets out the procedure which it considered should be followed by an insurer to constitute good faith, or freedom from negligence. See Steps to be Taken by Insurer, post.)

Schwartz v. Norwich Union Indemnity Co. (1933) 212 Wis. 593, 250 N. W. 446.

Action by the insured against his insurer for damages in the amount equal to the difference between his insurance coverage and the judgment rendered against him in an action in which the insurance company was bound to defend him, alleging that the insurer negligently defended the action. The amounts involved and the negligence claimed do not appear in the report. The defendant demurred to the complaint. *Held,* that the demurrer properly was overruled, the court saying:

"Assuming that the respondent is able to show that because of the fraud of appellant an avoidable claim against respondent ripened into a valid obligation, it then appears that there has been a fraudulent imposition upon respondent of a liability, from all or a portion of which he is entitled to be relieved."

Ballard v. Ocean Accident & Guarantee Co. (1936) 86 Fed. (2nd) 449.

Action by the insured under a $5000 automobile policy for the difference between the limit of the policy and $9,179, for which judgment was rendered against the insured, alleging negligence in the preparation for trial and in the presentation of the defense. *Held,* that the motion for the direction of a verdict for the defendant was improperly sustained because, applying the law of Wisconsin "the confusion of the words 'negligence' and 'bad faith' is merely tautological," it appears that liability of the insured arises from:

(a) Failure to obtain before trial evidence of the claimant's ability to work.
(b) Waiver during trial of the defense of contributory negligence, admission of the insured's negligence, and exclusive reliance upon a settlement made soon after the accident for $275.
(c) Declining all offers of settlement in amounts ranging from $800 to $4500,

the court saying:

"Thus, under the Wisconsin law, an insurance company is bound, in the good faith performance of its contract, to exercise that degree of care and diligence which a man of ordinary care and prudence

would exercise in the management of his own business, were he investigating and adjusting claims. * * * If the insurance company fails to meet this standard, it is guilty of negligence in the performance of its contract and becomes liable, upon that ground, to the assured for the excess over the policy limit, irrespective of any fraud or bad faith upon its part."

Lanferman v. Maryland Casualty Co. (1936) 222 Wis. 406, 267 N. W. 300.

Action by the insured under a $5000 automobile liability policy to recover $12,000 which was the amount of a judgment rendered against him, together with interest and costs, in excess of the policy limits, alleging that the insurer in bad faith refused to settle the claim before trial for $5000. It appeared that the insurer insisted upon the insured paying part of any proposed settlement, and upon showing that he was financially unable to do so, the insurer suggested that his father contribute. *Held,* that under the facts as given, the jury was justified in a finding of bad faith, and the insurer was held liable in excess of its policy limit.

*Steps to Be Taken by the Insurer Before Judgment*

I. Conduct reasonable, prompt and careful investigation.

A. In case of any questions as to coverage, obtain reservation of rights agreement, or if unobtainable, serve notice of reservation as soon as question appears.

II. If the case is one of probable (Hilker v. Western Automobile Ins. Co. (1931) 204 Wis. 1, 231 N. W. 257, 235 N. W. 413) liability.

A. Obtain demands for settlement.

B. Notify insured of demands if the same or probable value of claim in excess of policy coverage.

1. Inform insured that investigation made.

a. File is open for his inspection.

b. Open for suggestions with reference to further investigation.

(1) Conduct further reasonable investigation suggested by insured.

(2) Inform insured again in accordance with Bla and Blb after further investigation.

2. Inform insured of his right to settle his exposure to liability above coverage, but only under releases to be approved by the insurer.

C. Continue endeavor to settle.

III. In case of contemplated settlement.

A. If one claim is settled and others outstanding, so that amount of coverage on others is reduced thereby, notify insured of such fact arising from settlement.

1. Probably more advisable, if possible, to secure insured's consent or at least inform insured of effect before settlement (Oehme v. Johnson, 181 Minn. 138, 231 N. W. 817).

B. Obtain complete dismissal with prejudice of action so that no judgment is entered against insured.

C. Obtain valid release, including all possible extended insureds.

IV. When suit is filed.

A. Determine theory of plaintiff's petition.

1. If allegations of petition advance any theory for which there is no policy coverage determine whether to defend or refuse defense.

a. Defend under reservation of rights agreement if petition presents two or more theories, one of which, if proved, comes within policy coverage.

b. If petition states facts indicating no coverage, or if ambiguous as to such facts, obtain reservation of rights agreement before proceeding with defense.

C. If conflicts exist between insured and insurer, consider withdrawal from defense (Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2nd) 889).

B. If prayer is in excess of coverage.

1. Inform insured of such fact.

2. Authorize insured to employ his own attorney at own expense in addition to insurer's attorneys.

3. Assure cooperation of own attorneys with insured's attorney.

4. Select competent attorney to defend.

5. Inform insured in accordance with II hereof.

C. Determine validity of service upon defendant.

1. If question as to validity of process, raise and preserve question.

D. Consider question of removal and change of venue and inform insured and his attorney in ample time to exercise right.

E. File all pleadings promptly.

1. Prevent insured from being in default of pleadings at all times.

2. Submit pleadings, for suggestions, before filing, to insured's personal attorney, if one retained.

3. File all pleadings suggested by record.

4. Watch record for amendments and if prayer amended to amount more than coverage, follow suggestions of II, IVB and and IVD hereof.

5. Watch record for other amendments affecting IVA and IVD hereof and follow suggestions therein made.

6. Take necessary depositions for trial after giving notice to insured's attorney.

7. Obtain medical examination of plaintiff by competent, reputable physician or physicians, informing insured thereof and making report of examination available to him for suggestions.

8. Give reasonable notice to insured and his attorney of trial date and necessity of presence.

V. In case of trial.

A. Prepare and brief case prior thereto.

1. Consult with insured and his attorney with reference to all phases.

B. Assure attendance of witnesses.

1. Ask for suggestions from insured and his attorney.

C. Carefully and skillfully defend.

D. Preserve insurer's rights if policy defense becomes apparent during trial.

1. By agreement with insured, or

2. By asking for continuance and notifying insured of policy defense, if continuance refused (State Farm Mut. Auto. Ins. Co. v. Phillips, 210 Ind. 561, 2 N. E. (2nd) 989).

E. Keep insured and attorney informed of all settlement negotiations and demands.

*After Judgment*

I. Notify insured and his attorney of judgment.

II. Promptly (Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co., 32 Fed. (2nd) 425) advise insured of steps to be taken and time in which to appeal and consult with his attorney.

III. Preserve right to appeal.

IV. Inform insured and his attorney of possibility of settlement.

V. If other claims still pending consider effect of judgment thereon and consult with insured and his attorney with reference thereto.

VI. Consider necessity of insurer's taking appeal (Wynnewood Lumber Co. v. Travelers' Ins. Co., 173 N. C. 269, 91 S. E. 946; Getchell & Martin Lumber & Mfg. Co. v. Employers Liab. Assur. Corp., 117 Ia. 180, 90 N. W. 616).

VII. If insured and insurer make appeal possible, properly represent insured on appeal.

*Things Not to Do*

1. Do not do anything negatived above.

2. Do not misrepresent coverage, insured's financial ability or condition (Noshey v. American Automobile Ins. Co., 68 Fed. (2nd) 808).

3. Do not state company would not pay its coverage for settlement (McCombs v. Fidelity & Casualty Co., 231 Mo. App. 1206, 89 S. W. (2nd) 114).

4. In settlement do not enter judgment against insured for more than coverage without his express agreement, nor enter judgment at any time if other claims or causes of action may be available from the same accident.

5. Do not suggest that insured extinguish his financial ability to satisfy a judgment (Noshey v. American Automobile Ins. Co., 68 Fed. (2nd) 808).

6. Do not request insured to contribute to settlement below the policy limit.

# Cumulative Index of Addresses and Articles Appearing in Insurance Counsel Journal and Year Book 1928—1940